TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 365.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR,

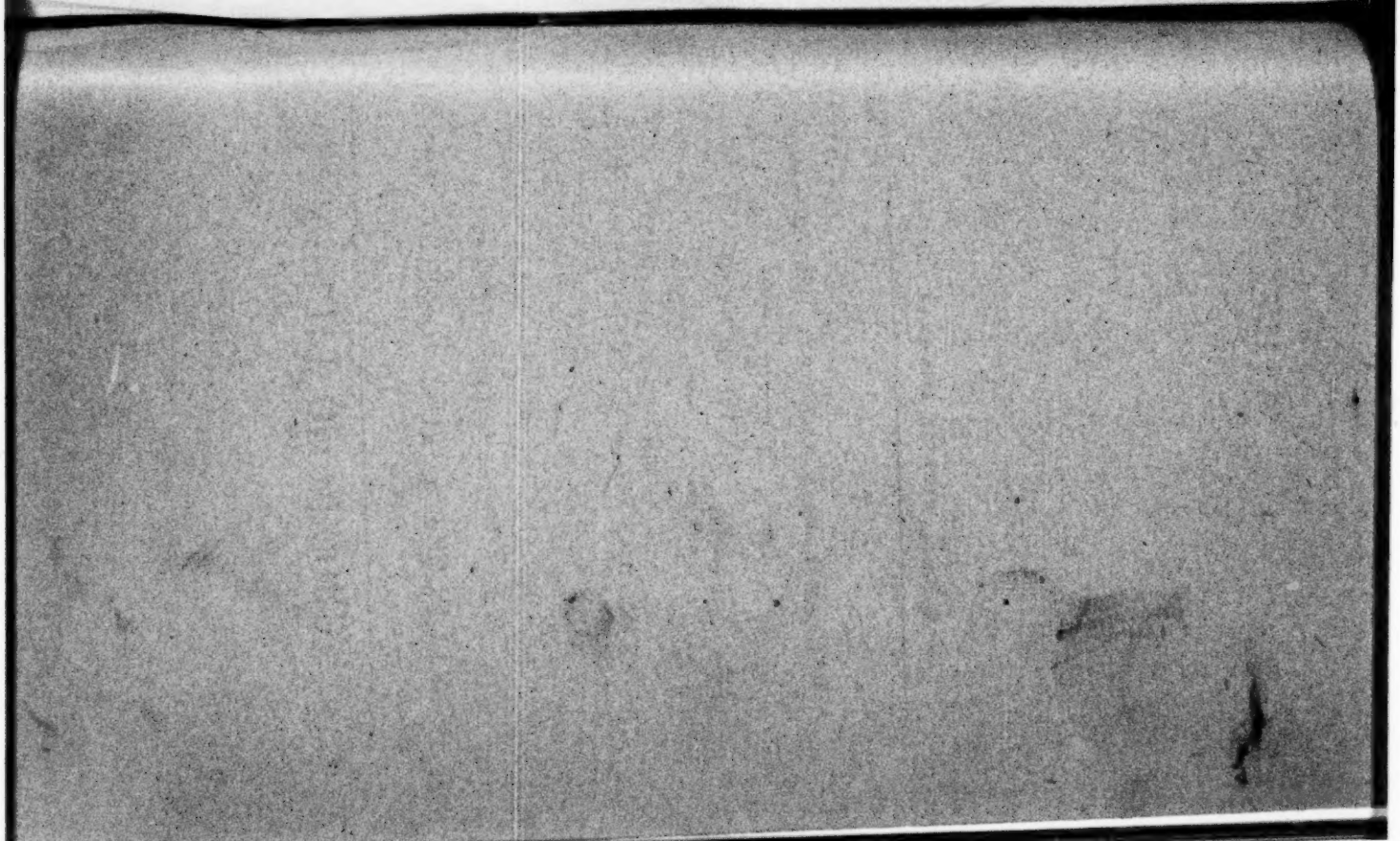
vs.

SVAN HOGLUND.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 28, 1916.

(25111)



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1 Court of Appeals of the District of Columbia.

SVAN HOGLUND, APPELLANT,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR.

a Supreme Court of the District of Columbia.

SVAN HOGLUND, PLAINTIFF,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, defendant. } At Law. No. 57974.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:

Bill.

Filed April 27, 1915.

In the Supreme Court of the District of Columbia.

SVAN HOGLUND, PLAINTIFF,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, defendant. } At Law. No. 57974.

To the Supreme Court of the District of Columbia, holding a law court:

Your orator complains and says:

Comes now your orator, Svan Hoglund, a citizen of the United States and of the State of California, and by and through Bynum E. Hinton, his attorney, brings this bill of complaint against Franklin K. Lane, a citizen of the State of California residing in the District of Columbia, defendant.

2 1st. That at the time of the filing of this bill, the defendant, Franklin K. Lane, was and still is Secretary of the Interior, and as such has charge of the administration of the laws of the United States relating to public lands and is sued in his official capacity as such Secretary of the Interior as hereinafter set forth.

2nd. That your orator on July 1, 1902 made settlement upon the NE. ¼ of the SE. ¼ and fractional SE. ¼ of NE. ¼ of sec. 34 and the N. ½ of SW. ¼ and fractional SW. ¼ of NW. ¼ of sec, 35, T. 19 N., R. 4 E. Humboldt meridian in the State of California, the same being then a tract of public land, non-mineral in character, free

from the rightful claim of any other person under the public land laws, not reserved or otherwise appropriated and subject to settlement and entry under the homestead laws of the United States and thereafter, to wit, on July 26, 1902, your orator in prosecution of the right gained under said settlement duly tendered to the register and receiver of the Eureka land district, California, in whose district these lands were situate, his formal application to make homestead entry for the land above described and settled upon accompanying the same with the fees required by law and with an affidavit wherein was set forth his qualifications, and thereupon the said register and receiver duly accepted your orator's application and payment, allowing his entry of this land and issuing to him a duplicate receipt of entry; that thereafter your orator continued for the period of more than five years to make the tract his only home, his residence thereon for that period being continuous, that he cultivated the land to the extent of his ability and necessities and in the improvement of the land expended more than $1,000 and on August 1, 1907, after due notice by publication as by law required, your orator made and submitted formal proof evidencing full compliance with the requirements of the homestead law in the matter of settlement, residence, and improvement, which proof was duly accepted by the local land officers, and on August 6, 1907 the said officers issued receiver's receipt on final entry and register's certificate.

3rd. That by the proviso of section 7 of the act of March 3, 1891, 26 Stat. L. 1095, it is provided:

"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered; and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor."

and your orator avers that no protest or contest against the validity of his entry was filed within two years from the date of the issuance of the receiver's receipt upon the final entry allowed your orator for this land, as aforesaid, and your orator then became entitled to a patent for this land and it became the ministerial
3 duty of the Secretary of the Interior to issue the patent of the United States to your orator.

4th. That your orator's rights under the receiver's receipt and register's certificate on final entry stood unquestioned by the United States or any person until by letter of the Commissioner of the General Land Office, dated April 19, 1910, an inquiry was directed respecting your orator's residence upon this land, the same being based upon the adverse report of a forest ranger, the land having been brought

within the exterior limits of a forest by proclamation of the President of date May 6, 1905.

5th. That under the inquiry directed by letter of the Commissioner of the General Land Office of April 19, 1910, your orator was cited to a hearing held before the local land officers at Eureka, California, at which the Government was represented by a special agent, and your orator appeared in person with attorney, and further proceedings were had resulting in a decision by said local land officers that your orator had fully met the requirements of the homestead law and therefore that the proceedings should be dismissed. A copy of this decision is hereto attached marked Exhibit No. 1 and is made a part hereof as if fully herein set forth.

6th. That on the matter coming before the Commissioner of the General Land Office for consideration on the record made under his order of inquiry, the said Commissioner of the General Land Office on July 16, 1912, rendered his decision in which he accepted your orator's proof as a satisfactory compliance with the provisions of the homestead law. A copy of this decision is hereto attached marked Exhibit No. 2 and is made a part hereof as if fully herein set forth.

7th. That because of the fact that the land in question had been brought within the exterior limits of a national forest, notwithstanding the favorable decisions of the register and receiver and the Commissioner of the General Land Office, upon your orator's proof and showing in the matter of his claimed compliance with the provisions of the homestead law, the jurisdiction of the Secretary of the Interior to review your orator's showing was invoked by the Solicitor for the Agriculture Department acting for the Forest Service of that department, with the result that the final decision of the Secretary of the Interior of Aug. 29, 1913, permitted and granted to your orator the privilege of supplementing his rightful claim to this land through purchase under the commutation provision of the homestead law incorporated in Section 2301 of the U. S. Revised Statutes. A copy of the said decision of the Secretary of the Interior is hereto attached marked Exhibit No. 3 and is made a part hereof as if fully herein set forth.

8th. That your orator acting under the said departmental decision without in any wise waiving his rights, secured by his previous compliance and proof, receiver's receipt and certificate issued, and in order to aid him in speedily receiving his patent for this land, paid unto the land office at Eureka, California, the sum of one hundred and sixty-eight dollars and twenty-five cents ($168.25), in payment for the land, the same being at the rate of $1.25 per acre, and
4 thereupon certificate in purchase was issued to your orator on October 10, 1913.

9th. That notwithstanding the repeated review of your orator's proof and showing submitted under the homestead law and notwithstanding there was no protest or contest filed against the validity of your orator's entry within the period of two years following the issuance of the receiver's receipt on final entry, Aug. 6, 1907, whereby

your orator became entitled to a patent for this land as provided in the act of March 3, 1891, hereinbefore quoted, your orator's right to a patent to this land was again reopened at the instance of the Solicitor for the Agriculture Department, and reconsidered by the Secretary of the Interior, who under date of September 23, 1914, rendered a memorandum opinion of mere conclusions both with respect to the facts and the law of the case, in effect overruling all previous decisions made and rendered in your orator's favor in this matter. A copy of the said memorandum opinion is hereto attached marked Exhibit No. 4 and is made a part hereof as if fully herein set forth.

10th. That because of the previous favorable decision in your orator's favor and because no definite ruling had been made upon your orator's right to a patent under the proviso to section 7 of the act of March 3, 1891, supra, your orator, thereupon, to wit, on October 4, 1914, invoked the supervisory power of the department by petition, to the end that his right to a patent under said act might be recognized and the adverse decision of September 23, 1914, recalled, and held for naught; at the same time notice was given the department of your orator's intention to file a bill to enjoin the cancellation of his entry in the event the said decision of September 23, 1914, was adhered to; and that notwithstanding your orator's notice, he was, on Arpil 22, 1915, served with notice of the decision of the Secretary of the Interior dated April 20, 1915, denying his petition and at the same time of the carrying into effect of the order for the cancellation of his entry, thus, in effect, forestalling his expressed desire, through a bill for an injunction, to test the right of the Secretary of the Interior to cancel the said entry. A copy of the said decision of April 20, 1915, and of the notice of cancellation are hereto attached marked Exhibits 5 and 6 and made a part hereof as if fully herein set forth.

Wherefore your orator prays:

That your honórs grant to your orator a writ of mandamus commanding the said Franklin K. Lane, Secretary of the Interior, to recall and revoke his said orders for the cancellation of your orator's entry as made in his decision of September 23, 1914, and April 20, 1915, and directing that your orator's entry be fully reinstated upon the records of the Land Department as it was prior to the said orders, and that he cause the patent of the United States to be issued upon said entry as provided for and required by the said act of March 3, 1891.

And to the end that the defendant may, if he can, show why your orator should not have the relief herein prayed, and make full, true and perfect answer, according to the best of his knowledge, remembrance, information and belief to the several matters hereinbefore averred and set forth, as fully and particularly as if the same were herein repeated paragraph by paragraph and he was thereto specifically interrogated, may it please your honor to grant unto your orator a writ of subpœna and respon-dem, issuing out of and under the seal of this honorable court, directed to the said

defendant, Franklin K. Lane, commanding him to be and appear and make answer unto this petition.

And that your orator may have such other and further relief in the premises as the nature of the circumstances may require.

SVAN HOGLUND,
By BYNUM E. HINTON.

B. E. HINTON,
F. W. CLEMENTS,
Att'ys for Plaintiff.

Bynum E. Hinton, being duly sworn, deposes and says that he is the attorney of record of Svan Hoglund, plaintiff named in the foregoing petition, and is acquainted with the facts and matters set forth therein, and is authorized to verify the same; that he has read the same over and knows the matters alleged therein are true, except such matters as are alleged on information and belief; and as to those he believes they are true.

BYNUM E. HINTON.

Subscribed and sworn to before me this 27" day of April, 1915.

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN, *Asst Clk.*

EXHIBIT No. 1.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
Eureka, California, November 28, 1911.

UNITED STATES, CONTESTANT,
vs.
SVAN HOGLUND, ENTRYMAN.

Involving H. E. No. 4793, Serial No. 01410, made Junly 26, 1902.

Opinion of the register and receiver.

By authority of the commissioner's letter "P" of April 19, 1910, proceedings were ordered against homestead entry, serial No. 01410, made July 26, 1902, made by Svan Hoglund, for the NE. ¼ SE. ¼, fractional SE. ¼ NE. ¼, section 34, the N. ½ SW. ¼ and fractional SW. ¼ NW. ¼, section 35, T. 19 N., R. 4 E., H. M.

The charges were preferred by a forest officer, alleging that the entryman did not establish and maintain a residence on the land.

6 On May 5, 1910, the entryman was duly notified of said charges and on May 26, 1910, an affidavit duly sworn and subscribed to was filed denying the charges and applying for a hearing.

On March 27, 1911, an order was issued by the register and receiver setting the date for taking testimony on May 31, 1911, before Superior Judge John L. Childs, at Crescent City, California, final hearing before the register and receiver at Eureka, California, on June 28, 1911.

On May 31, 1911, both parties appeared with counsel and witnesses, the Government being represented by Special Agent W. H. Bennett; George W. Howe, of Crescent City, appearing for the entryman.

On June 13, 1911, the register and receiver, at the request of the chief of the field division, continued the date of the final hearing until July 28, 1911.

On June 24, 1911, on motion of the chief of the field division, commission was issued to John Moss, a notary public, of Grant's Pass, Oregon, and to the clerk of Benton County, Oregon, to take the depositions of Fred Ahlberg and Hugh M. Guthrie, respectively.

On July 28, 1911, the Government filed the deposition of Ahlberg and Guthrie and final hearing was held; no one appearing for the Government; George W. Howe, representing the entryman, being present and presented a brief and filed a demurrer to the proceedings on the grounds of the insufficiency and irrelevancy of the testimony, and said demurrer was overruled.

The charges as preferred allege "that the entryman did not establish and maintain a residence on the land."

While cultivation and improvements are requisites of a bona fide homestead entry, their relationship to the entry will not be overlooked, but this opinion will treat principally with the establishment and maintenance of residence.

The first question to be decided in the case is whether or not residence was actually established. The testimony tends to show that the entryman went to his claim and repaired and improved an old cabin that was on the land, about the last of September, 1902, or about two months after making entry, providing himself with a cook stove and a bedstead, a table, and some benches out of rough lumber, secured provisions and remained on the claim about 3 weeks, then went to Portland and elsewhere, being away somewhat more than 2 months, then returned to the homestead about the 1st of January, 1903, and remained on the claim continuously, except for temporary absences of about 2 weeks, until the latter part of July, 1903, making somewhat less than ten months of contin-ous residence during the first year of the life of the entry (the two absences referred to above are considered by this office as being temporary), if we add to this the two months' constructive residence pending the time of establishing residence it will be seen that the entryman is entitled to credit for 12 months' continuous residence during the first year of the entry.

Between January and July of 1903 the entryman erected a new house of 3 rooms, while not an elaborate affair, is much better
7 than most bachelor entryman have, with practically 12 months and actually 8 months of residence, can any one doubt the bona

fide intentions of this man or question the actual establishment of residence? Certainly not.

The next question is, Did Svan Hoglund maintain a residence on the land? From the date of his entry until July 27, 1903, he most assuredly did. From the last mentioned date until May 26, 1906, he was employed by Hobbs, Wall & Co. in their lumber yard at Crescent City, about 50 miles distant from the homestead, at from 35 to 40 dollars per month, including board and bunk room. During these three years his time on the claim was very slight, approximately about 5 months or less in all. Periodically he would leave his work to go to his homestead "to see to things." From May 26, 1906, until about August 1, 1907, he remained on the claim continuously. We find that from the date of entry until final proof was made there has been a total residence of about 30 months, or an average of 6 months for five years. The claimant asserts that at the time he made entry his total possessions amounted to between 50 and 100 dollars. He probably earned more during his two months' absence in the winter of 1902, but in the spring he builds a new house, lives on the claim nearly 7 months where he has no income, then for lack of money he has to go to work to earn something to live on and with which to continue his improvements. During all these years his homestead was thought of and not forgotten, else why these trips back and forth.

"No fixed rule can be formulated as to what constitutes good faith, the facts and circumstances surrounding each case should be carefully considered, and if the acts of the entryman do not clearly indicate bad faith the entry should not be forfeited." (4 L. D. 80).

The fact that this entryman resided practically all of the first year on the claim, built a house when the old one might have answered the purpose, is surely an element of good faith. The circumstances surrounding the claim, its remoteness from market, the cost of clearing, and the financial condition of the entryman does not show bad faith for slackness of residence for three years. His act in returning to the claim and staying on the claim 14 months from May, 1906, to August, 1907, and clearing the same, is surely showing good faith. His action from the inception of the entry until final proof and since clearly indicate good faith and a bona fide intention of complying with the homestead law. There is nothing in the testimony to show that the entryman ever intended to abandon the claim, and while it is true the greater part of his time from July 27, 1903, to May 26, 1906, was spent in a bunk house at Crescent City, still it was in no way a home; he was there only temporary as a guest as many more were; a place to sleep and eat, which would immediately terminate were he discharged or quit the employ of the company.

As additional evidence of good faith it is shown that Hoglund, in the spring of 1903, erected a new house of 3 rooms with a shed attached, when most men in an unmarried condition would have

been contented with the old cabin that he had previously oc-
8 cupied; put in a floor of tongued and grooved lumber, and furnished the same with everything necessary for housekeeping by a single man, then for four years more continued to improve his home by clearing land, building a barn and wagon road, fencing, etc., at a cost of seven or eight hundred dollars in money and labor. It is sought to discredit the evidence of the entryman and the estimated cost of the improvements, but he is corroborated by witnesses Peterson and Frodelius; Frodelius saying he would not undertake to do what has been done on the claim for less than $1,000. Both these witnesses have met and passed through the same conditions under similar circumstances and in the same locality; they have had to clear land; had to build and purchase material and to devise means with which to live on and at the same time continue their improvements; therefore we are inclined to accept their statements in preference to those who had nothing but theoretical opinions to offer.

As to cultivation under such circumstances, what were the use of raising more than could be used on the home. The question as to whether it would not be profitable to raise potatoes and fruit and haul them to Crescent City or Grant's Pass, 50 miles away, would not have been asked by one that had once undertaken it; that he did cultivate the land to a certain extent for the five years subsequent to making the entry and up to the time of final proof, appears to us as coming within the requirements of the law.

The charge is "That entryman did not establish and maintain a residence on the land."

There is no other charge, and as we have found that he did establish and maintain a bona fide residence during a period of five years immediately subsequent to entry, it is hardly necessary to proceed any further in this opinion, but as the law provides that after an entryman has fully complied with the law and has submitted proof, he is no longer required to live on the land, but is expressly warns him that if he discontinues his residence prior to issuance of patent he does so at a risk in the event of an unsatisfactory proof or other evidence that would warrant the cancellation of the entry; in this case it appears that from August 1, 1907 until September 23, 1910, the entryman was absent from his work with Hobbs, Wall & Co., at Crescent City, on 8 different occasions, aggregating 114 days, if we are to believe the statements of the entryman and other witnesses, and there is no reason why we should not; these absences were for the purpose of going to his homestead to "see to things," in other words, to look after the conditions of his improvements and personal belongings that had been left in his house, in one instance he was away 31 days, another for 20 days, and at other times from 4 to 14 days; this appears conclusive to us that his home, the only one he had, was present in his mind at all times, else why this longing to go back to it; surely not for the tramp of 50 miles

or more; there is nothing in evidence to show that he ever tried to dispose of it or that any one had tried to purchase the claim; he was not trying to sell; every action prior to and since final proof clearly show good faith and nowhere can we find intentional bad faith.

While it is true there is considerable timber on the land it
9 has been repeatedly held that such lands are agricultural and subject to homestead entry. There is no reason why this should be an exception; therefore that phase of the matter will be passed.

The case at bar is in all respects identical with that of the United States vs. Bernhardt Frodelius involving H. E. Serial No. 01255 Eureka series, wherein the register and receiver decided in favor of the entryman, were sustained by the commissioner, patent for the land issuing sometime since.

We are of the opinion that the Government's charges have not been sustained; that the entryman has acted in entire good faith; that the charges be dismissed and that homestead entry, serial No. 01401 pass to patent.

DAVID J. GIRARD, *Register.*
GEORGE KIMBALL, *Receiver.*

EXHIBIT No. 2.

DEPARTMENT OF THE INTERIOR,
July 16, 1912.

UNITED STATES
v.
SVAN HOGLUND.

Involving Homestead Entry No. 4793, for NE. ¼ of SE. ¼ and fractional SE. ¼ NE. ¼ of sec. 34, and N. ½ of SW. ¼ and fractional SW. ¼ of NW. ¼ of sec. 35, T. 19 N., R. 4 E., H. M. F. F. C. No. 1865.

Klamath National Forest—Affirmation—Proceedings dismissed.

Register and Receiver, Eureka, California.

GENTLEMEN: Entry was made July 26, 1902, alleging settlement July 1, 1902; final proof was submitted August 1, and certificate issued August 6, 1907.

The township within which the land lies was suspended by letter E of June 9, 1887; suspension was revoked by letter E of July 29, 1892. The land was temporarily withdrawn by telegram January 23, 1904, and was reserved for forestry purposes by proclamation of May 6, 1905. No coal withdrawal appears of record.

Proceedings were directed by letter P of April 19, 1910, on a forest ranger's adverse report, upon a charge of failure to establish and maintain residence. The case proceeded regularly to trial on

May 31, 1911, before a designated officer; the Government appeared by a special agent, and the entryman appeared in person and by attorney; both parties submitted testimony, but the defendant demurred to the Government's evidence. A continuance was
10 had to July 28, 1911, and certain depositions were taken. On November 28, 1911, you joined in decision for the contestee, and you transmitted the record on January 5, 1912.

R Eureka 01401 JFL.

There was a miner's cabin on the land when the entry was made, which this entryman repaired so as to make it susceptible of temporary occupancy, and he placed therein a stove, bed, homemade chairs and table, beside cooking utensils and provisions. In 1908 he built a frame house 18x24 feet in size, 12 feet to the eaves; this house was sided with 12 foot pine or fir sawed lumber, was floored with 5-inch staff, planed and matched; it had a shake roof, four windows and two outside doors, and contained three rooms. Claimant bought and placed therein chairs, bed, lounge, book shelf, and a heating stove. A barn about 14x20 feet in size was built of rough lumber, roofed with shakes and partly floored with split puncheons. About one-half mile of road was built. Claimant constructed about sixty-five rods of split picket fence, inclosing the house and cleared area of a little less than two acres; twenty-five or thirty rods of rail fence appears to have been built on one corner of the entry, not forming any inclosure. It is not clear just how much land the claimant meant to testify was cleared by him, though it is at least two acres, and he appears to mean that one or two other small tracts were cleared near a creek which drosses the land. One witness estimated a tract which he found cleared and broken at 1.33 acres; this tract appears to have been seeded to grass. There was testimony that a garden of perhaps one-half acre was raised each year, beginning with 1903; there was testimony that vegetables mature, and that entryman carried water to irrigate the garden: it appears, however, that during one or more years at least a neighbor worked in the garden and raised such vegetables as were raised. Claiment alleged that he set out———four or five feet high. It appears that claimant had a cow, calf, and chickens on the land during at least fourteen months prior to proof. There was a spring a few hundred feet from the house, and when this was dry water was obtained from a creek from one-eighth to one-fourth mile from the house. The house was estimated at from $125 to $2.00; the barn at $75, the picket fence at from $25 to $40, and the rail fence at from $20 to $25; the entryman estimated his building at $257 and his clearing at $300 to $400; his witness Frodelius said that he would not replace the improvements for less than $1,000.

The testimony indicates that the land has a stand of three and one-half of four million feet of timber, mostly Douglas fir, with some

cedar and pine; one Government witness states that $1 a thousand would be a conservative estimate, and another estimated the fir at $1.50 a thousand and the cedar and pine higher. One witness said it would cost $250 an acre to clear the land. The timber is not evenly scattered, but stands somewhat "in spots." The land has a
11 clay soil, and its topograph- is broken except that there is from twenty-five to forty acres of fairly level land lying along Elk Creek.

The entryman is a single man. He alleges that he was on the land in September, 1902, for two or three weeks, when he was "fixing up" the house. He stated that he then went to Portland and other points out of the State, remaining until January, 1903, when he returned to the land and stayed until the middle or end of July, except that he was away working at Selma for a short time—two or three weeks, as he thought. In July he went to work at Crescent City, which was forty or fifty miles from the land, for the lumber mill of Hobbs, Wall & Company, and had continued to work for that company much of the time since. According to his own statement, he was on the land in November, 1903, for three weeks or a month; in 1904, in April or May for about a month; and in November from three weeks to a month; in April or May for about a month, and for two or three weeks in November; when he went to the land in May, 1906, he remained there practically all the time until proof, in August, 1907. He alleged that since proof he had been on the land about two months in all, once for about two weeks the autumn before hearing. While working for the company he ate at the company's boarding house and had a free room there; he received $35 or $40 a month when working, and alleged that he had spent nearly all his earnings on the entry; he stated that he only had between $50 and $100 when the entry was made, and that he could not make a living on the land, this being the reason that he left it after proof; he stated that he had made no sale of the land, and one witness stated that his furniture was still in the homestead house, though another saw only a bench and cook stove there. The cashier of the lumber company testified for the Government and gave the dates of claimant's absences from work, which correspond substantially with the periods of alleged residence on the entry as given by the claimant himself. The other testimony as to residence is less specific. You say in your decision that the case appears to be essentially similar to that of Bernhardt Frodelius, your serial 01255, in which decision was rendered by the office in letter R of August 24, 1910, dismissing proceedings, from which decision the Solicitor of the Department of Agriculture did not appeal, the entry involved being later patented. These two entries lie in the same vicinity and are, apparently, for the same class of lands. This office has carefully compared the facts in the two cases, and it appears that the showing made by Frodelius was somewhat better than that of this entryman; Frodelius was married, and his wife lived with him on the land during

the fourteen months immediately preceding proof, during which time forest officers and others ate meals with them and found the improvements to be of unusually good quality and the house furnished in a very homelike manner; Frodelius also had as an excuse for leaving the land after proof the sickness of his wife, who had to be removed to a lower altitude. This entryman shows no such excuse, but relies upon the fact that he could not make a living on the land as a reason for leaving it after he submitted proof.

12 Besides, Frodelius lived on the land about two months each spring and fall from 1903 to 1906, whereas this entryman seems to have spent only about one month each spring and fall on his claim. Otherwise, however, the facts are, as you say, essentially the same in the two cases; and, while the residence maintained during the three years mentioned is not entirely satisfactory and bears the semblance of constituting only visits to the claim, yet it appears that residence was established in good faith and maintained for about six months prior to that period, and that the residence was resumed and continuously maintained for fourteen months or so just prior to proof. In the opinion of the office the state of facts shown does not warrant a conclusion that the land was abandoned between 1903 and 1906; but that all the evidence taken together tends to show a continuing claim and compliance with law, which, though weak in some respects, may be accepted as satisfactory under all the circumstances.

Accordingly, your decision is affirmed and the proceedings are dismissed. This action is subject to the right of the Solicitor of the Department of Agriculture to appeal to the Secretary of the Interior within the time allowed by the Rules of Practice. The said officer has been advised by this office of his said right of appeal, but you will advise the entryman of the action hereby taken, furnishing him a copy of this decision, which is enclosed herewith for that purpose. Should this decision become final, further appropriate action will be taken upon the entry.

Very respectfully,

_____ _____,
Ass't Commissioner.

Board of Law Review.

EXHIBIT No. 3.

Department of the Interior. "R." D–2240. Ex parte: Svan Hoglund. Eureka 01401. Petition allowed.

Petition for exercise of supervisory authority.

Svan Hoglund has applied to the department for the exercise of its supervisory authority with reference to his homestead entry for the NE. ¼ SE. ¼ and fractional SE. ¼ NE. ¼ sec. 34, N. ½ SW. ¼ and fractional SW. ¼ NW. ¼ sec. 35, T. 19 N., R. 4 E., H. M., Eureka, Cali-

fornia, land district, which was cancelled by departmental decision of May 13, 1913, motion for rehearing whereof was denied on July 15, 1913.

13 This entry was made on July 26, 1902, it being stated in the application that Hoglund settled on the land on July 1, 1902. The land embraced in the entry was included in the Klamath Froest Reserve on May 6, 1905 (34 Stat., 3001), subject to the following exception:

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by an lawful filing duly of record in the proper United States land office or upon which any valid settlement has been made, pursuant to law, and the statutory period within which to make entry or filing of record has not expired; Provided, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, or settlement was made.

The proceeding which resulted in the cancellation of the entry was directed by the Commissioner of the General Land Office on April 19, 1910, upon the charge of failure to establish and maintain residence. At the hearing on May 31, 1911, testimony was submitted showing, as has hereto been found by the department, that:

The land in controversy contains about 4,000,000 feet of timber, chiefly Douglas fur, with cedar and pine, the claimant alleged that he settled on the tract during September, 1902, and remained two or three weeks. He returned to the land during January, 1903, and remained until July following. During July, 1903, he secured employment at a lumber mill, forty or fifty miles from the land, and continued to work for said mill until the date of the hearing. According to his own statement, he was on thel and in November, 1903; April or May, 1904; November, 1904; April or May, 1905; and November, 1905, and for from two weeks to a month or more on each occasion. He lived on the land continuously from May, 1906, until August, 1907, when he submitted proof. Final certificate was issued to him on August 6, 1907. His cultivation of the tract consisted of the raising of a garden each year of one-half acre or less.

Upon the foregoing finding of facts with reference to the claimant's residence and cultivation of the land, the department held, in its said decision of May 13, 1913, that:

His alleged residence upon the tract prior to the date of his entry and until May, 1906, was in the nature of occasional visits, and that the withdrawal for forestry purposes, under the terms of the proclamation, has attached.

Upon reconsideration of the entire record, it is believed that an erroneous disposition has been made of this case. Undoubtedly at the date of the withdraw-l for forestry purposes, and for sometime thereafter, the entry was subject to attack and cancellation because of the claimant's failure to substantially meet the requirements of the homestead law as to residence and cultivation. As has been

with the law might after the reservation was created by such compliance gain his right to a patent renders valueless the words "continues to comply with the law," which necessarily means that the entryman up to the time of reservation has complied with the law.

(Signed) FRANKLIN K. LANE.

16 EXHIBIT No. 5.

D-22240. "R." April 20, 1915. Svan Hoglund.

Eureka 01401. Homestead Entry Held for Cancellation. Petition Denied.

July 26, 1902, Sven Hoglund made homestead entry 01401, in the Eureka, California, land district for the NE. ¼ SE. ¼ and fractional SE. ¼ NE. ¼, sec. 34, the N. ½ SW. ¼ and fractional SE. ¼ NW. ¼, sec. 35, T. 19 N., R. 4 E., H. M. The land was temporarily withdrawn for proposed forest reservation January 23, 1904, and included in the Klamath National Forest by proclamation of the President dated May 6, 1905 (134 Stat., 3001); final proof was submitted by the entryman August 1, 1907, and final certificate and receipt issued August 5, 1907.

November 12, 1908, a deputy forest supervisor filed report containing information which, when transmitted to the Commissioner of the General Land Office May 29, 1909, resulted in the ordering of a hearing by the commissioner April 19, 1910, upon the charge that entryman did not establish*ment* and maintain residence upon the land.

Hearing was had and decisions rendered by the register and receiver and the commissioner, sustaining the entry.

May 13, 1915, the department, upon appeal filed by the Solicitor for the Department of Agriculture, reversed the decisions below and held the entry for cancellation on the ground—that the defendant has not complied with the law as to residence and cultivation of the land; that his alleged residence upon the tract, prior to the date of his entry and until May, 1906, was in the nature of occasional visits; and that the withdrawal for forestry purposes under the terms of the proclamation has attached.

A motion for rehearing of the latter decision was denied July 15, 1913. Petition for the exercise of supervisory authority was filed on behalf of the entryman, and on August 29, 1913, the department vacated the prior decisions and directed that entryman be allowed to submit commutation proof upon his entry. Thereupon the entryman took the necessary action and paid the amounts required, and commutation cash certificate issued October 10, 1913.

A motion for reconsideration of the case was filed by the Solicitor for the Department of Agriculture. Upon consideration thereof the department, September 24, 1914, reversed its decision of August 29, 1913, and directed the cancellation of the entry. A further petition for the exercise of supervisory authority, to the end that the

17 entry may be sustained and patented, was filed on behalf of the entryman October 4, 1914.

The facts in the case, as found from the entryman's final proof and from the evidence given at the hearing, are substantially as follows: Claimant settled upon the tract during September, 1902, and remained two or three weeks. He was then absent until January, 1903, when he returned and remained until the following July. In July, 1903, he secured employment at a lumber mill 40 or 50 miles distant from the land and continued to work at that place until the date of hearing, May 31, 1911. He states that he was on the land in November, 1903; April or May, 1904; November, 1904; April or May, 1905; and November, 1905; for from two weeks to a month or more on each occasion. He lived upon the land continuously from May, 1906, to August, 1907.

The land in controversy contains about 4,000,000 feet of timber, chiefly Douglass fir, with cedar and pine. No real or substantial cultivation appears to have been performed upon the claim, the area cleared being estimated at less than 2 acres, upon which some vegetables were grown, either by the entryman or by persons employed by him, the area so cultivated being estimated at from half an acre to 1.33 acres. The other improvements upon the land at date of hearing consisted of a 3-room house, apparently unfurnished, a barn, and about 65 rods of picket fence.

The proclamation of the President creating the national forest contains the following clause:

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: Provided, That this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, or settlement was made.

Departmental decision of September 23, 1914, which directed the cancellation of Hoglund's entry, cited this proclamation, and after describing the nature and extent of Hoglund's alleged residence, held:

Commutation proof can not be allowed as to lands within a national forest where the law as to homestead entries was not being complied with when the reservation was created, because the Government has the right to the land as a reservation, if it is found that the law was not being complied with when the reservation was created. The reservation of the lands by the Government is effective as against those who have not complied with the conditions of the homestead law. Commutation as to forest lands can not cure defects inherent in the claim at the time the reservation was made. It is the Government's policy to withdraw all lands which at the time of withdrawal are properly subject to attack for failure to comply with the law. Therefore no new rights are acquired after the date of reserva-

18 tion. Commutation is only a waiver of certain condition named by the Government and the substitution of other Where the land is withdrawn by the Government prior to the begin ning of the commutation period, proof must be made that at the dat of withdrawal the homestead law was being complied with by th entryman. This is necessarily so because the right to commute ca only be conceded if the Government's right to the land as a part o the reservation did not attach.

The petition now before the department contends that the evidenc shows good faith and compliance with the law by the entryman, an (1) that claimant is entitled to a patent for the land under the pro viso to section 7 of the act of March 3, 1891 (26 Stat., 1095), for th reason that more than two years elapsed after the issuance of receiv er's receipt on the final entry, dated August 6, 1907, before the order ing of the hearing on the forest officer's report; (2) that because o the existence of claimant's uncancelled homestead entry the with drawal for forestry purposes never attached to the land; and (3 that claimant's entry being a valid appropriation of the land prior t the order of withdrawal, the right to commute was secured, which wa not effected by the inclusion of the lands within a national forest.

The case of Jacob A. Harris (42 L. D., 611) is cited in support o the contention that the entry is confirmed.

Upon a careful consideration of the record in the case, the depart ment must conclude, as already found in its decisions of May 13 and July 15, 1913, that at the date of the proclamation of the President May 6, 1905, creating the Klamath National Forest, Hoglund was not and had not been complying with the requirements of the homestead law. Prior to that time and until May, 1906, his connection with the land was maintained through temporary visits of from two weeks to a month in extent, at very infrequent intervals, the small amount of cultivation in the garden during this period having been carried on during entryman's absence by his neighbors. In other words, up to May, 1906, entryman's claim to the land was in the form of mere visits at such intervals as to preclude the idea that he was making the land his home and as to support the contention that they were visits merely for the purpose of holding the land and preventing contest thereagainst.

The proclamation already quoted undertook to protect from the operation of the withdrawal lands included in a legal entry or embraced in a valid settlement, but expressly provided that this pro tection should not—

continue to apply to any particular tract of land unless the entry man, settler, or claimant continues to comply with the law under which the entry, filing, or selection was made.

It is clear from the evidence, as already stated, that Mr. Hoglund was not complying with the provisions of the homestead law at and prior to May 6, 1905, and that he therefore could not continue to comply with such law. His compliance with the letter of the home

19 stead statute began a year later, May, 1906, and, as stated, continued until August, 1907. It was then too late, however, to cure the default existing at the date of the withdrawal of the land for a public use, and under the law and the terms of the proclamation the reservation had attached.

The action of the department, August 29, 1913, in granting Hoglund's petition and permitting commutation was an attempt to extend to him equitable consideration and overlooked the fact that under the proclamation of May 6, 1905, withdrawal had, under the facts, barred such action. This equitable consideration, while designed to extend liberal treatment to Hoglund, did not and could not annul or modify the legal effect of the withdrawal for the national forest, and the commutation proof submitted and the certificate issued under said order, October 10, 1913, did not validate or confirm the claim as against the attachment of the reservation for public use.

As previously stated, the entry was ordered cancelled by departmental decision of May 13, 1913, on appeal, by decision on rehearing of July 15, 1913, and upon petition for the exercise of a supervisory authority by decision of September 24, 1914; and the act of March 3, 1891, supra, section 7, was not invoked by the entryman, but is for the first time plead in the petition now before me. Said statute is not operative in this case, because the withdrawal for public use as a national forest attached to the land May 6, 1905, at a time when entryman was not complying with the law, prior to the issuance of receiver's receipt and certificate upon the final proof offered August 1, 1907, and, as stated, final action ordering the cancellation of the entry has heretofore been entered by the department.

The reinstatement of the proof, certificate, and receipt is barred by the President's proclamation of May 6, 1905, supra, and by the provisions of administrative rule of March 4, 1914 (43 L. D., 165). The allowance of the commutation proof, as already explained, was an attempt at equitable consideration and not recognition of legal right in the entryman, and can not be construed or held to validate the entry and proof in the face of the withdrawal for public purposes at a time when the entryman had not been and was not complying with the provisions of the homestead law.

The petition is accordingly denied, first, because claimant's entry and his acts thereunder were not a valid appropriation of the land at and prior to the proclamation withdrawing same: second, because under the express terms of said proclamation the land was, on May 6, 1905, withdrawn for national forest purposes, and entryman could not, by subsequent attempts designed to comply with the requirements of the homestead law, revive his claim in the face of the withdrawal, and third, because the entry is not confirmed by the proviso to section 7 of the act of March 3, 1891, supra. The homestead entry will be cancelled as directed in departmental decision of September 23, 1914.

(Signed) FRANKLIN K. LANE,
Secretary.

20 EXHIBIT No. 6.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, April 21, 1915.

IN RE UNITED STATES
vs.
SVAN HOGLUND.

Involving H. E. No. 4793 and C. C. No. 01401, Klamath National Forest.

Mr. BYNUM E. HINTON,
Munsey Building, Washington, D. C.

SIR: Your appearance having been filed in the above-entitled case for entrym'n, you are hereby notified that, pursuant to departmental decision of April 20, 1915 (copy inclosed), denying entryman's motion for exercise of supervisory authority, the original and cash entries herein involved and above described have this day been cancelled and the case has been closed.

Very respectfully,

(Signed) C. M. BRUCE,
Assistant Commissioner.

Rule to show cause.

Filed April 27, 1915.

* * * * * * *

Upon consideration of the petition filed in the above-entitled cause it is by the court this 27th day of April, 1915,

Ordered, That the defendant, Franklin K. Lane, Secretary of the Interior, be, and he is hereby, required to show cause, if any he has, on the 1st day of May, 1915, at 9:30 o'clock a. m., why the writ of mandamus should not issue as in said petition prayed, provided that a copy of this order be served upon said defendant by or before the 27th day of April, 1915.

ASHLEY M. GOULD, *Justice.*

Marshal's return.

Copy of the within rule served personally on Franklin K. Lane, 27th day of April, 1915.

MAURICE SPLAIN,
U. S. Marshal.

R.

21 *Answer.*

Filed May 15, 1915.

* * * * * * *

Comes now Franklin K. Lane, Secretary of the Interior, respondent in the above-entitled cause, and, for return to the rule to show

cause why mandamus should not issue as prayed in relator's petition, says:

1. He admits the averments of paragraph 1.

2. Answering the averments of paragraph 2, he denies the plaintiff on July 1, 1902, made settlement upon the described lands or any part thereof, but admits that on, to wit, July 26, 1902, relator made formal application to make homestead entry, but denies that there was then or thereafter prior to the withdrawal of said lands for forest purposes any valid settlement thereon of the lands described in said paragraph. Respondent admits that thereafter, to wit, on August 6, 1907, receiver's receipt on final entry, as well as register's certificate, issued to him, upon making and submission of final proof as therein alleged; but he denies the allegation that for a period of more than five years after date of entry, to wit, July 26, 1902, relator made said tract so entered his only home, and that his residence thereon for that period was continuous; but on the contrary he states that when in due and regular course the matter of relator's compliance with the homestead laws came on to be heard before your respondent, in the manner hereinafter more particularly set forth, it was found as a fact and so determined from the evidence adduced by the respondent, in the exercise of his judgment and discretion as the head of the Land Department, that relator's alleged residence upon said tract, prior to May, 1906, was in the nature of occasional visits and that it was not such residence as the homestead law contemplates and requires; and he pleads the fact to be that at no time prior to May, 1906, did relator actually reside upon and cultivate the tract entered as aforesaid by him within the meaning and requirements of the provisions of the homestead law. And save as to the effect herein admitted, he denies the allegations of said paragraph 2.

3. Answering the allegations of paragraph 3, he says that he is advised that the same amount to mere conclusions of law which he need not answer; but he says that as a matter of fact on November 12, 1908, a deputy forest supervisor did file a charge against the integrity of relator's entry, protesting that relator had not established a residence upon his said entry and had not cultivated said land; and that said protest against the relator's entry was duly transmitted to and was filed in the General Land Office May 29, 1909, and was the basis on which subsequent proceedings, culminating in the cancellation of said entry, rested, as hereinafter is more specifically set forth; and he further avers that said protest so filed by said forest supervisor was filed within two years from the date of the issuance of the receiver's receipt and was pending against the validity of relator's entry at the end of said two year period.

4. Respondent denies the allegation of paragraph 4 that relator's rights were unquestioned by the United States or any person until April 19, 1910, but admits that the inquiry into relator's residence upon the land in question was based upon the adverse report of the forest supervisor as in the last preceding paragraph of

this return set forth and also admits that the lands involved were by President's proclamation of date May 6, 1905, brought within the exterior limits of and became a part of the Klamath National Forest.

5-6. While admitting generally the allegations of paragraphs 5 and 6, respondent states the facts to be that relator's rights under the receiver's receipt and the register's certificate on final entry were questioned by the forest supervisor, as hereinbefore more particularly appears, and that in consequence thereof charges were formulated in the General Land Office against relator's entry; that after due notice thereof to relator, relator filed his answer to said charges and applied for a hearing "to determine the truth of said charge made as aforesaid by said officer of the forest service and this (i. e., entryman's) answer"; that hearing so requested by the relator was duly ordered and the cause came on to be heard before the judge of the Superior Court of the county of Del Norte, in the State of California, thereunto duly authorized by the register and receiver to take the evidence; that said hearing commenced on May 31, 1911, the relator being represented by counsel who examined and cross-examined the witnesses presented; that relator himself was present and testified in his own behalf; that thereafter and on various dates depositions were taken in the cause at the caption of all of which relator appeared by his attorney; and on July 28, 1911, the case came on finally to be heard by the register and receiver; that at no time during the progress of the hearings as aforesaid did relator in any way except to or question the jurisdiction of the local land officers, but on the contrary submitted the case for decision after his demurrer to the sufficiency of the evidence had been overruled by said register and receiver; that after thus having accorded due process of law to the relator, the register and receiver rendered the decision alleged in said paragraph 5, which decision was affirmed by the Commissioner of the General Land Office in the decision referred to in paragraph 6. But he further avers that the findings of fact by the register and receiver and by the Commissioner of the General Land Office as to relator's actual residence on said land prior to May, 1906, do not in law, as your respondent held and decided when the validity of relator's homestead entry came before him for final review and determination, show a compliance with the requirements of the homestead law.

7. He admits generally the averments of paragraph 7 with this qualification: That when the correctness of the decisions referred to in paragraphs 5 and 6 came on for review before the Secretary of the Interior, as the head and ultimate authority of the Land Department, said decision of the Commissioner of the General Land Office was reversed and it was held and decided by the Secretary of the Interior upon consideration of all the evidence adduced in the case, both

23 that offered against claimant and that produced in his behalf, that he had not complied with the homestead law and was not entitled to a patent for said land and that the entry should be cancelled; wherefore relator's entry was held for cancellation on May 13

1913, which decision was adhered to on motion for rehearing on July 15, 1913, on the ground that relator had failed to comply with the requirements of the homestead law in respect to residence, especially prior to May, 1906; but that thereafter, as averred in said paragraph 7, the matter again came before the Secretary on a petition for the exercise of supervisory authority, resulting in the decision set forth in relator's petition and marked as his Exhibit No. 3.

8. He admits the allegations of paragraph 9 to the extent that the same set forth the fact that relator made commutation proof as averred; but he avers that the same constituted a waiver and abandonment of any alleged rights such as relator, in said paragraph, claims were not waived by him.

9. Aside from relator's conclusion that no contest or protest was filed against his entry within two years following the issuance of receiver's receipt, which respondent denies, he admits the allegations of paragraph 9.

10. Respondent admits the averments in paragraph 10 as to the filing on October 4, 1914, of petition for the exercise of supervisory power of the department and the action taken thereon; but as to whether said petition was filed because of previous favorable decision in relator's favor and because no definite ruling had been made upon relator's right to a patent under the proviso to section 7 of the act of March 3, 1891, he has no knowledge and no information other than as averred by relator; but he states the fact to be that at no time and at no stage of the proceedings prior to the filing of the petition for supervisory authority aforesaid, October 4, 1914, had relator ever invoked said act of March 3, 1891, or asked any ruling in regard thereto or questioned in anywise the jurisdiction, authority, and right of the Secretary of the Interior to enquire into and decide the question of whether relator had in good faith complied with the homestead laws, and especially as to whether he was at and prior to the forest withdrawal complying with said homestead law.

11. And for further and complete answer to the rule, respondent avers that on January 23, 1904, the President of the United States, acting under authority by law vested in him, temporarily withdrew certain lands for a forest reservation, and that the land claimed by relator was situate within the outboundaries of the land so withdrawn; that on May 6, 1905, the President by proclamation included the tract so withdrawn in the Klamath National Forest; that the said proclamation contained the following provision:

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: Provided, That this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant con-

24 tinues to comply with the law under which the entry, filing, or settlement was made.

That on said date, to wit, May 6, 1905, the relator was not complying with the law under which his entry was made, and thereafter until May, 1906, did not continue to comply with said law; and that at no time prior to the date of the President's proclamation creating said forest, to wit, May 6, 1905, had there ever been any compliance by relator with the homestead law; that in consequence of said failure and want of compliance with the requirements of the homestead law and by operation of the terms of the proclamation making said withdrawal and creating said forest reserve, relator's entry and all right in him thereunder became extinguished and destroyed and the land became embraced in the withdrawal for forestry purposes and thereupon became a part of said national forest, and unappropriable under the homestead laws, except in the special manner prescribed by the act of June 11, 1906 (34 Stat., 233); that upon becoming a part of said national forest, the jurisdiction of the Department of the Interior to dispose of said land under the homestead law, except as by the last above-cited act of Congress specially provided, ceased, and all acts and deeds thereafter undertaken or performed by any officer of the Department of the Interior attempting to dispose of said land to the relator as public land of the United States available for disposition under the homestead law were undertaken and performed without jurisdiction and authority of law and were void and to be held for naught; that the lands embraced in this action are now and at all times, since May 6, 1905, have been a part of the said Klamath National Forest, and the Secretary of the Interior is now and has been since said date without any rightful authority to dispose of same under the homestead laws to the relator or to issue him any patent therefor.

Wherefore, having made complete answer to the rule to show cause, he prays that the same may be discharged, that the petition herein filed be dismissed with his reasonable costs, and that he be permitted to go hence without day.

FRANKLIN K. LANE,
Secretary of the Interior.

PRESTON C. WEST,
Solicitor for the Department of the Interior.
C. EDWARD WRIGHT,
Assistant Attorney.

DISTRICT OF COLUMBIA, *ss:*

Franklin K. Lane, Secretary of the Interior, being first duly sworn, says that he has read over the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein set forth he is informed are true and he believes them to be true.

FRANKLIN K. LANE,
Secretary of the Interior.

COPY BOUND

25 Subscribed and sworn to this 14" of May, 1915.
Before me.

[SEAL.]

W. BERTRAND ACKER,
Notary Public in and for the District of Columbia.

Joinder of issue.

Filed June 4, 1915.

* * * * * * *

Now comes the relator, by his attorneys, and joins issue upon the respondent's return to the rule to show cause in the above-entitled action.

B. E. HINTON,
F. W. CLEMENTS,
Attorneys for Relator.

Agreed statement of facts.

Filed July 9, 1915.

* * * * * * *

The above-entitled cause coming on to be heard by the court on relator's joinder of issue of respondent's return to the rule to show cause, it is hereby stipulated and agreed that the following statement of facts is to be taken as true the same as if each fact was introduced and proved in evidence.

I.

That on July 26, 1902, Svan Hoglund duly made entry under the homestead law, for the NE. ¼ of SE. ¼ and fractional SE. ¼ of NE. ¼ of sec. 34, and the N. ½ of SW. ¼ and fractional SW. ¼ of NW. ¼ of sec. 35, 19 N., R. 4 E., Humboldt Meridian, Eureka land district, State of California.

II.

That thereafter, to wit, on August 1, 1907, after due notice by publication, the said Svan Hoglund made and submitted final proof upon said entry, which proof was accepted by the local land officers, and on August 6, 1907, receiver's receipt on final entry and register's certificate were issued to him upon said entry.

III.

That the land described in paragraph I hereof, and being the land here in controversy, was within the exterior limits of a tract of land withdrawn temporarily for national forest purposes by Executive order dated January 23, 1904, and was brought within the exterior limits of the Klamath National Forest by proclamation of the President, dated May 6, 1905 (34 Stat., 3001).

OSE IN CENTER

IV.

That under date of November 12, 1908, a deputy forest supervisor made a report upon said entry in words and figures as follows:

United States Department of Agriculture. Forest Service. Report on agricultural settlement. Siskiyou National Forest, California. Eureka, California, land district.

1. Location of settlement or farm: NE. ¼ SE. ¼ & frac. SE. ¼ NE. ¼ sec. 34, and N. ½ SW. ¼ and frac. SW. ¼ NW. ¼ sec. 35, T. 19 N., R. 4 E., Humbol-t Mer.
2. Name of present claimant or owner: Svan Hogland, address of present claimant or owner: Wakefield, California.
3. If claimant has a family, of what members does it consist? Single.
4. Is the land patented or held as a homestead or other entry, mining claim, or simply as a squatter location? Give number of entry: Homestead entry No. 4793.
5. Description of dwelling and other buildings, giving size, materials of which built, and number of rooms in dwelling: House 12 x 24 ft. built of rough lumber, shake roof, probable value $100, three rooms. Barn built of rough lumber 14 x 20', shake roof, probable value $50.
6. How much of the land is suited to tilling? Probably 15 acres if cleared.
   Acres of land under plow: About 3 acres. Acres of land under fence, and kind of fence: 3 acres.
   Acres of land under ditch: None.
   Acres of land slashed: ——.
7. Where any or all of the improvements built by present claimant? How much of the land was plowed, slashed, ditched, or fenced by present claimant? ——.
8. What does claimant raise on the land? Small amount of hay and vegetables.
   How much was raised the past season? ½ ton of hay and 600 lbs. potatoes.
   What area has been cultivated, and in what years? About 2 acres, last two or three years.
9. Number of acres of timberland on the claim: 124 acres.
   Estimated number of feet of timber in board measure, and approximate value: 4,000,000 ft. b. m.

27 How much, if any, timber has been cut?
None except small amount for fencing.
For what purpose cut? Improvements.
By whom cut? Claimant. Date of cutting: 1902.
If cut for cultivation, has the ground where the timber stood been cultivated, and how cultivated? No timber cut except for building purposes.

If cut for improvements, how much of the timber cut was put into improvements on the claim? Yes.

Has claimant sold or negotiated for the sale of any timber? No.

10. Live stock owned by claimant:

Number of cattle: None.

Number of horses: None.

Number of sheep: "

Number of goats: "

Does his stock graze on the claim at large, or in an enclosure? ——.

If grazed on public land within the national forest, has permit been obtained? ——.

11. Date claimant settled on this land: June, 1902.

Date claimant filed on this land: July 26, 1902.

Date claimant established actual residence on this land: June, 1902.

State whether claimant has lived continuously on land, or only at certain times: Claimant has lived only at certain times upon the land, going away to work for wages four or five months at a time.

Give dates and duration of and reasons for absences and report if family remained on land during such absence. ——.

Give source of information: Could not ascertain dates of absences, but Alfred Peterson, Waldo, Ore., states that claimant has been upon the claim but very little, having hired most of the improvements done.

What evidence of residence, such as cultivation or presence of farming implements or household furniture, were found by forest officers? No farming implements or household furniture. No cultivation by claimant; has hired Alfred Peterson, Waldo, Ore., to seed about 2 acres to hay and plant a few potatoes for the past four years.

12. Is the claim used in any way for trade or business? ——.

13. Ascertain, if possible, whether this claimant has ever made a homestead entry elsewhere; if so, state where and whether it has been perfected or abandoned; does he own over 160 acres of land? Claimant made H. E. in Wilas County, Wisconsin, about 8 years ago but abandoned the same.

14. Has claim been sold or mortgaged? No record of any transfer or mortgage.

15. If this claim or entry is believed to have been made at the instance or in the interest of any others, or believed to be in any way fraudulent, give name, residence, and postoffice address of reliable witnesses and abstract of their testimony: No testimony.

16. For what purpose is the land most valuable? Timber.

17. Date forest officer examined this claim: Oct. 10, 1908.
18. Opinion of forest officer concerning the good faith of claiman and reason for such opinion: This claim was undoubtedl taken for the timber that is upon it. Claimant works in logging camp near Crescent City, Cal., for a livelihood an has never made any part of his living from claim.
19. Is land used for any purpose not contemplated by law?
20. Recommendation as to action that should be taken: This clai should be cancelled on account of non-residence and lack c cultivation.

Dated at Grants Pass, Ore., 11/12, 1908.

HUGH M. GUTHRIE,
Deputy Forest Supervisor.

Approved Nov. 13, 1908.
MILTON J. ANDERSON,
Forest Supervisor.

V.

That said report was duly transmitted by the district foreste within whose district the said land was situated, to the Commissione of the General Land Office, where the same was received on May 2 1909.

VI.

That as a result of said report, the Commissioner of the Genera Land Office, on April 19, 1910, ordered proceedings against sai entry; that on May 5, 1910, process issued against relator in word and figures as follows:

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
Eureka, California, May 5, 1910.

Mr. Svan Hoglund, Deering, Oregon:

By authority of General Land Office letter "P" of April 19, 1910 you are hereby notified that an officer of the forest service has file the following charges against the validity of your homestead entry No. 4793, made July 26, 1902, for SE. ¼ NE. ¼, sec. 34, N. ½ SW. ¼ and fractional SW. ¼ NW. ¼, sec. 35, T. 19 N., R. 4 E., Humbold meridian, to wit:

1. That entryman did not establish and maintain residence o the land.

You are notified that if you fail to file in this office, within thirty days of date of service of this notice, a written or printed answer under oath, denying each of said charges, or showing a state of fact rendering said charges immaterial, and applying for a hearing t determine the truth of said charges and answer, or if you fail t appear at a hearing applied for, your said above entry or claim wi be rejected, and, if of record, will be canceled.

Very respectfully,

DAVID J. GIRARD, *Register.*

If you deny the charges, make denial affidavit in triplicate. That thereafter, and under date of May 21, 1910, relator made his sworn denial of said charges and applied for a hearing "to determine the truth of said charge made as aforesaid by said officer of the Forest Service and this (i. e., the relator's) answer"; that on March 27, 1911, order issued out of the local land office at Eureka, California, setting said cause for hearing, on May 31, 1911, before the judge of the Superior Court for the county of Del Norte, California, and for final hearing before the register and receiver on June 28, 1911; that said cause duly came on to be heard and evidence was taken before said judge at hearings commencing on said May 31, 1911; that at these hearings relator was represented by counsel who examined and cross-examined the witnesses; that relator himself was present and testified in his own behalf; that thereafter and on various dates depositions were taken at the caption of which relator appeared by his attorney; and that on July 28, 1911, the cause came on finally to be heard by said register and receiver; that relator then and there demurred to the sufficiency of the evidence to sustain the charge that entryman did not establish and maintain residence on the land, but at no time during the progress of the case before said local officers, excepted to the jurisdiction of said officers; that said demurrers to the sufficiency of the evidence having been overruled, the said register and receiver proceeded to judgment in the cause and on November 28, 1911, rendered their decision therein in words and figures as set forth in relator's Exhibit No. 1, and which is made a part of this statement the same as if set forth in full herein; that thereafter and pursuant to the requirement of the rules and regulations of the Land Department in that behalf obtaining, said decision came on for review by the Commissioner of the General Land Office, and said commissioner on July 16, 1912, rendered his decision affirming said decision of said register and receiver, in words and figures as set forth in relator's Exhibit No. 2, and which is made a part of this statement the same as is set forth in full herein; that thereafter on an appeal taken in that behalf by the Solicitor for the Department of Agriculture the decision of the Commissioner of the General Land Office aforesaid came on for review by the Secretary of the Interior, and on May 13, 1913, in a decision signed by the Assistant Secretary of the Department of the Interior, the said decision of the Commissioner of the General Land Office was reversed; the said decision of May 13, 1913, being in words and figures as follows:

Department of the Interior, Washington, May 13, 1913.

"R." D-22240. Eureka 01401. Ex Parte: Svan Hoglund. Proceedings dismissed. Reversed. Appeal from the General Land Office.

The Solicitor of the Department of Agriculture has filed an appeal from the decision of the Commissioner of the General Land Office, dated July 16, 1912, affirming the action of the local officers

and dismissing the proceedings instituted by the Government against the homestead entry, made on July 26, 1902, by Svan Hoglund for the NE. ¼ SE. ¼ and fractional SE. ¼ NE. ¼, sec. 34, and N. ½ SW. ¼ and fractional SW. ¼ NW. ¼, sec. 35, T. 19 N., R. 4 E., H. M. Eureka, California, land district.

The commissioner's decision contains a full statement of the testimony submitted at the hearings in this case, as well as of the record facts pertaining to the entry, of which the following are the controlling considerations.

The land involved herein was included in the Klamath Forest Reserve on May 6, 1905 (34 Stat., 3001), subject to the following exception:

"Excepting from the force and effect of this proclamation all lands which may have been, prior to the date thereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office upon which any valid settlement has been made, pursuant to law, and the statutory period within which to make entry or filing of record has not expired: Provided, That this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, or settlement was made."

The land in controversy contains about 4,000,000 feet of timber, chiefly Douglas fir, with cedar and pine; the claimant alleged that he settled on the tract during September, 1902, and remained two or three weeks. He returned to the land during January, 1903, and remained until July following. During July, 1903, he secured employment at a lumber mill, forty or fifty miles from the land, and continued to work for said mill until the date of the hearing. According to his own statement, he was on the land in November, 1903; April or May, 1904; November, 1904; April or May,
31 1905, and November, 1905, for from two weeks to a month or more on each occasion. He lived on the land continuously from May, 1906, until August, 1907, when he submitted proof. Final certificate was issued to him on August 6, 1907. His cultivation of the tract consisted of the raising of a garden each year, of one-half acre or less.

From the above, it clearly appears that the defendant has not complied with the law, as to residence and cultivation of the land; that his alleged residence upon the tract, prior to the late of his entry and until May, 1906, was in the nature of occasional visits, and that the withdrawal for forestry purposes, under the terms of the proclamation, has attached.

The decision appealed from is, accordingly, reversed and the entry canceled.

LEWIS C. LAYLIN,
Assistant Secretary.

That thereafter relator filed motion for rehearsing therein, which motion was denied by the department on July 15, 1913; that thereafter, however, relator filed a petition for the exercise of supervisory authority, which was allowed by the decision of the First Assistant Secretary, rendered on August 29, 1913, in the words and figures as set forth in relator's Exhibit No. 3, and which is made a part of this statement the same as if set forth in full herein.

VII.

That following said decision of August 29, 1913, relator in furtherance of said decision, made payment of one hundred and sixty-eight dollars and twenty-five cents ($168.25), under section 2301 of the Revised Statutes of the United States, on which certification of purchase was issued to him for the above-described land, October 10, 1913.

VIII.

That thereafter and on application in that behalf made by the Solicitor for the Department of Agriculture, the Secretary of the Interior personally considered the decision of August 29, 1913, aforesaid, and on September 23, 1914, rendered a decision in words and figures as set forth in relator's Exhibit No. 4, and which is made a part of this statement the same as if set forth in full herein.

IX.

That thereafter relator, on October 4, 1914, filed a petition for the exercise of supervisory authority to the end that his entry might be sustained and passed to patent, and in April 20, 1915, said petition was denied by the Secretary in a decision in words and figures as set forth in relator's Exhibit No. 5, and notice of cancellation was duly mailed to relator's attorney of record in words and figures as set forth in relator's Exhibit No. 6; both of which exhibits are made a part of this statement the same as if set forth in full herein.

32

X.

That it is agreed that on the hearing of this cause, either party may be heard respecting the relevancy or materiality of any particular fact or facts appearing in this statement.

B. E. HINTON,
F. W. CLEMENTS,
Attorneys for Relator.
PRESTON C. WEST,
Solicitor for the Department of the Interior.
C. EDWARD WRIGHT,
Assistant Attorney,
Attorneys for Respondent.

Supreme Court of the District of Columbia.

FRIDAY, July 16th, 1915.

Session resumed pursuant to adjournment, Hon. Wendell Stafford, Justice, presiding.

* * * * * * *

This cause came on to be heard upon the petition, the rule to sho cause issued, the answer to said rule, and the agreed statement of fac filed herein and, after argument thereon by attorneys of record f the respective parties, was submitted to the court.

Upon consideration whereof, it is considered that the said rule show cause be, and the same is hereby, discharged, and the petitio dismissed, and further that the defendant recover of the petitione his costs of defense and have execution thereof.

From the foregoing, the petitioner by his attorneys of record, open court, notes an appeal to the Court of Appeals; whereupon, th penalty of a bond for costs is hereby fixed in the sum of one hun dred dollars ($100.00) with leave to deposit fifty dollars ($50.00 with the clerk in lieu of such bond.

Memorandum—August 6, 1915.—Appeal bond approved and filed

Assignment of errors.

Filed August 27, 1915.

* * * * * * *

Errors assigned by the appellant herein are as follows, to wit:

I.

That the Supreme Court of the District of Columbia erred in fail ing to find and hold that as there was no protest or contest instituted against the final homestead entry of the plaintiff within two
33 years following the issuance of the recorder's receipt on plaintiff's final entry, that said entry was confirmed by the proviso to section 7 of the act of March 3, 1891 (26 Stats., 1095), and that, therefore, there remained but the ministerial duty on the part of the defendant to patent the said entry as by law provided.

II.

That the Supreme Court of the District of Columbia erred in not finding and holding that the act of the defendant in ordering the cancellation of the plaintiff's said confirmed final homestead entry was in violation of law, arbitrary, unusual, and without legal sig nificance.

III.

That the Supreme Court of the District of Columbia erred in dismissing plaintiff's bill and discharging the rule thereon, and in

failing to grant to the plaintiff relief as prayed for as against the unlawful, unusual, and arbitrary act of the defendant in refusing to patent the land to the plaintiff under his said confirmed homestead entry, as by law provided.

B. E. HINTON,
F. W. CLEMENTS,
Attorneys for Relator.

Designation of record.

Filed August 27, 1915.

* * * * * * *

For the purposes of the appeal prayed and allowed herein on the 16th day of July, 1915, the clerk will please prepare the transcript of records, including therein the following:

1. Petition for writ of mandamus, including all exhibits.
2. Rule to show cause.
3. Answer of respondent to petition and rule.
4. Agreed statement of facts.
5. Memorandum of judgment discharging rule and dismissing petition.
6. Memorandum of appeal bond.
7. Assignment of errors.
8. This designation.

B. E. HINTON,
F. W. CLEMENTS,
Attorneys for Relator.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from
34 1 to 50, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 57974 at Law, wherein Svan Hoglund is plaintiff and Franklin K. Lane, Secretary of the Interior, is defendant, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at the city of Washington, in said District, this 14th day of September, 1915.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

(Endorsed on cover:) District of Columbia Supreme Court. No. 2875. Svan Hoglund, appellant, vs. Franklin K. Lane, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Sep. 20, 1915. Henry W. Hodges, clerk.

35 Monday, December 6th, A. D. 1915.

SVAN HOGLUND, APPELLANT,
v.
FRANKLIN K. LANE, SECRETARY of the Interior. } No. 2875.

The argument in the above-entitled cause was commenced by Mr. F. W. Clements, attorney for the appellant, and was continued by Mr. Preston C. West, attorney for the appellee, and was concluded by Mr. F. W. Clements, attorney for the appellant.

36 In the Court of Appeals of the District of Columbia.

SVAN HOGLUND, APPELLANT,
v.
FRANKLIN K. LANE, SECRETARY of the Interior, appellee. } No. 2875.

Opinion.

Mr. Justice Van Orsdel delivered the opinion of the court.

This appeal is from a judgment of the Supreme Court of the District of Columbia dismissing the petition of appellant for a writ of mandamus to compel defendant, the Secretary of the Interior of the United States, to issue him a patent for land.

The petitioner, Svan Hoglund, on July 26, 1902, made a homestead entry for one hundred and sixty acres of the public lands of the United States. The entry was accepted, and on August 6, 1907, he made final proof and a final certificate was duly issued to him.

On May 6, 1905, the President, under authority of the public land act of March 3, 1891 (26 Stats. L., 1095), issued a proclamation creating the Klamath National Forest, which embraced within its limits the land entered by petitioner. The Secretary of the Interior by decision of April 20, 1915, held that petitioner, prior to the date of the creation of the forest reservation, had not complied with the provisions of the homestead law, and, therefore, his land was embraced within the withdrawal of the proclamation.

If the department at the date of this decision had jurisdiction of this case, the construction placed upon the statute and proclamation being a matter within the discretion of the Secretary, would be conclusive of review in this proceeding. Ness vs. Fisher, 223 U. S., 683. But the jurisdiction of the Secretary is assailed on the ground that more than two years elapsed after the issuance of the final certificate before any protest or contest against the validity of petitioner's entry was made. It is contended that the case falls within the proviso to section 7 of the public land act aforesaid, which provides as

37 follows: "That whenever it shall appear to the Commissioner of the General Land Office that a clerical error has been committed in the entry of any of the public lands such entry may be suspended, upon proper notification to the claimant, through the local land office, until the error has been corrected; and all entries made

nder the preemption, homestead, desert-land, or timber-culture laws, n which final proof and payment may have been made and certifi-ates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to he first day of March, eighteen hundred and eighty-eight, and after final entry, to bona-fide purchasers, or incumbrancers, for a valuable consideration, shall unless upon an investigation by a Government agent, fraud on the part of a purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance: Provided, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent co..veying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor."

It is clear that the above proviso is jurisdictional in its operation and fixes a limitation beyond which the Secretary is without jurisdiction to question the right of an entryman to his patent. We are not estopped to construe the act by a departmental construction of it in this case. It is urged by counsel for the Government that it is merely a statute of limitations, and the petitioner waived its benefit by failing to take timely advantage of it. It is not a mere statute of limitations, which relates to and affects procedure, and could,
38 therefore, be waived. It is a statute of repose, affecting and settling the title to real estate. It establishes a limitation within which the Government or a private individual may by protest or contest challenge the title of an entryman. When the time expires the right ceases. If there is any waiver here, it is on the part of the Government and not the entryman.

It appears that within the two-year limitation a deputy forest supervisor reported to the department, on what seems to be a blank form used in making reports respecting land entries, recommending that "this claim should be cancelled on account of nonresidence and lack of cultivation." No action was taken upon this report until April 19, 1910, almost three years after the receiver's final receipt had been issued, when the Commissioner of the General Land Office ordered proceedings against the entry, in pursuance of which petitioner was notified on May 5, 1910, by the land officers that charges had been filed questioning his compliance with the provisions of the homestead law in matter of residence. Indeed, no formal action by way of protest or contest was ever taken by the Government in this case.

This brings us to the construction of the act. By its express terms one of the grounds upon which an entryman's title may be assailed within the two-year limit is when an adverse claim origi-

nates prior to the final entry. The claim of the Government that this land was embraced in the forest reserve is nothing if it is not adverse. Therefore, its successful assertion could only be accomplished within the limitations of the act.

The mere report of the deputy forest supervisor is not sufficient to constitute a legal protest or contest. Before the Government can bring itself within the act some affirmative action must be taken by the department which formally challenges the entryman's right and of which he has full notice, with opportunity to answer and be heard. We think the interpretation given the act by the First Assistant Secretary of the Interior in the case of Harris, 42
39 L. D., 611, is correct, and, since the construction comes from an officer with initial jurisdiction to pass upon the act, we feel it our duty, when consistent, to give it our approval. In the Harris decision, after an elaborate review of the reasons which impelled Congress to place this limitation in the act, the Assistant Secretary said: "Upon mature consideration, the department is convinced that a contest or protest to defeat the confirmatory effect of the proviso must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof; and, in conformity with the well-established practice of the department, such a proceeding will be considered as pending from the moment at which the affidavit is filed, in the case of a private contest or protest, or upon which the Commissioner of the General Land Office, on behalf of the Government, requires something to be done by the entryman or directs a hearing upon a specific charge."

Clearly nothing was done by the department in the present case to bring it within its own interpretation of the act. Such a step was essential to enable the Government to retain jurisdiction to question the regularity of petitioner's conduct prior to final proof. The two-year period having elapsed, the law settled petitioner's title so far as the Land Department is concerned. Hence, nothing remains to be done but the mere ministerial act of issuing a patent.

The judgment is reversed, and the cause is remanded with instructions to issue the writ of mandamus, as prayed in the petition.

Reversed and remanded.

40 Monday, January 3rd, A. D. 1916.

SVAN HOGLUND, APPELLANT, *vs.* FRANKLIN K. LANE, SECRETARY OF the Interior.	No. 2875, January term, 191

Appeal from the Supreme Court of the District of Columbia.

This cause come on to be heard on the transcript of the record fro the Supreme Court of the District of Columbia and was argued l counsel. On consideration whereof, it is now here ordered and a judged by this court that the judgment of the said Supreme Court this cause be, and the same is hereby, reversed with costs; and th

this cause be, and the same is hereby, remanded to the said Supreme Court with instructions to issue the writ of mandamus as prayed in the petition.

Per Mr. Justice Van Orsdel, January 3, 1916.

41 In the Court of Appeals of the District of Columbia. January term, 1916.

SVAN HOGLUND, APPELLANT, *v.* FRANKLIN K. LANE, SECRETARY OF THE INTERIOR.	No. 2875.

Petition for writ of error.

Now comes Franklin K. Lane, Secretary of the Interior, the defendant and appellee in the above-entitled cause, and respectfully shows that on or about the 3d day of January, 1916, this court entered a judgment herein in favor of the appellant and against the appellee reversing the judgment of the Supreme Court of the District of Columbia in favor of the appellee, in which judgment of the Court of Appeals certain errors were committed to the prejudice of the appellee, all of which will appear more in detail from the assignment of errors filed with this petition.

The appellee and defendant further shows that the judgment of the Court of Appeals of the District of Columbia in this case is subject to review by the Supreme Court of the United States under the provisions of paragraph 5 of section 250 of the Judicial Code,
42 in that the validity of an authority exercised by the appellee under the United States as Secretary of the Interior and the scope of power exercised by him as such Secretary of the Interior were drawn in question.

The appellee further shows that the judgment of the Court of Appeals is reviewable by the Supreme Court of the United States under the provisions of paragraph 6 of said section 250 of the Judicial Code, in that the construction of an act of Congress—to wit, the 7th section of the act of March 3, 1891 (26 Stat., 1095)—was drawn in question by the appellee, who was the defendant below, who asserted and relied upon a construction of said statutes contrary to that placed thereon by the Court of Appeals in its judgment herein.

Wherefore, appellee prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and that the mandate of this court be stayed until further order.

FRANKLIN K. LANE,
Secretary of the Interior.

By his attorneys:

PRESTON C. WEST,
Solicitor for the Department of the Interior.
C. EDWARD WRIGHT,
Assistant Attorney.

43 In the Court of Appeals of the District of Columbia. January term, 1916.

SVAN HOGLUND, APPELLANT,
v.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR. } No. 2875.

Assignment of errors.

And now comes the appellee, by his attorneys, and says that in the record and proceedings of the Court of Appeals in the above entitled cause, and in the rendition of the final judgment therein manifest error has intervened to the prejudice of said appellee in this, to wit:

1. That said court erred in reversing the judgment of the Supreme Court of the District of Columbia in favor of appellee and against the appellant, and in remanding the cause for an order directing the issuance of a mandamus against the appellee.

2. That said court erred in not affirming the judgment of the Supreme Court of the District of Columbia rendered in this cause.

3. That the court erred in holding and deciding that the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), is

44 jurisdictional in its operation and is not a statute of limitations which can be waived.

4. That the court erred in failing to hold and decide that said proviso is a statute of limitations which, to be availed of, must be set up and relied on by an entryman whose entry is under contest.

5. That the court erred in holding that the proviso to the seventh section of the act of March 3, 1891, is a statute of repose, settling the title to real estate and fixing a period of time within which the Government may challenge the title of the entryman, and that upon the expiration of such period the right so to challenge ceases.

6. That the court erred in holding that after the lapse of two years from the date of the issue of the receiver's final receipt the Secretary of the Interior is without jurisdiction to question the right of an entryman to a patent unless prior to the expiration of such period of two years some affirmative action was taken by the land department formally challenging the entryman's right, and of which he had full notice, with opportunity to answer and be heard.

7. That the court erred in holding and deciding that the report of the deputy forest supervisor, filed in the General Land Office within two years after the date of the receiver's receipt, on the entry involved was not a good, sufficient, and legal protest within the meaning of the proviso to section 7 of the act of March 3, 1891.

8. That the court erred in failing to hold and decide that where a homestead entry falls within the outboundaries of a national

45 forest created by Executive proclamation by the terms of which the entry is excepted from the force and operation of the proclamation only so long as the entryman continues to comply with the requirements of the homestead law, and where the fact appears that at the time of the creation of such forest, for some ti

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before and for about a year thereafter, the entryman was not complying with the requirements of said law either in respect to cultivation or residence, his inchoate rights become extinguished by his own conduct and the land embraced by his entry becomes a part of said national forest by operation of the proclamation creating the same.

9. That the court erred in directing the issue of a writ of mandamus commanding the Secretary of the Interior to take action in a matter in direct opposition to his judgment rendered in a case properly within his jurisdiction and involving the exercise of his discretion.

10. That the court erred in holding that in an action against the Secretary of the Interior by one claiming to be entitled to a patent under the homestead laws, the Secretary may be properly directed by writ of mandamus to issue such patent notwithstanding his formal decision finding that the entryman had not complied with the law and was not entitled to such patent.

11. That the court erred in directing the issue of a patent for a tract of public land in a suit to which the United States is not a party.

Wherefore, Franklin K. Lane, Secretary of the Interior, ap-
46 pellee in the above-entitled cause in said Court of Appeals, prays that for the errors aforesaid and other errors appearing in the record of said Court of Appeals in said cause to the pejudice of the appellee, the said judgment of said Court of Appeals may be reversed, annulled, and for naught esteemed, and that said cause be remanded to said Court of Appeals with instructions to affirm the judgment of the Supreme Court of the District of Columbia in said cause rendered, or for such further proceedings in said cause as may be determined by the Supreme Court of the United States, to the end that justice may be done in the premises.

FRANKLIN K. LANE,
Secretary of the Interior.

By his attorneys:

PRESTON C. WEST,
Solicitor for the Department of the Interior.
C. EDWARD WRIGHT,
Assistant Attorney.

(Endorsed:) No. 2875. Svan Hoglund, appellant, vs. Franklin K. Lane, Secretary of the Interior. Petition for writ of error and assignments of error, and to stay mandate. Court of Appeals, District of Columbia. Filed Jan. 19, 1916. Henry W. Hodges, clerk.

47 Saturday, January 22d, A. D. 1916.

SVAN HOGLUND, APPELLANT, *v.* FRANKLIN K. LANE, SECRETARY OF THE INTERIOR.	No. 2875.

On consideration of the petition for the allowance of a writ of error to remove the above-entitled cause to the Supreme Court of the United States and to stay the mandate in said cause until further

order, it is by the court this day ordered that said petition be, and the same is hereby, granted.

48 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals before you, or some of you, between Svan Hoglund, appellant, and Franklin K. Lane, Secretary of the Interior, appellee, a manifest error hath happened, to the great damage of the said appellee, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 22d day of January, in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

49 UNITED STATES OF AMERICA, *ss:*

To Svan Hoglund, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Franklin K. Lane, Secretary of the Interior, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 22d day of January in the year of our Lord one thousand nine hundred and sixteen.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 24 day of January, 1916.

F. W. CLEMENTS,
Counsel for Svan Hoglund.

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50 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 49, inclusive, contain a true copy of the transcript of record and proceedings of said court of appeals in the case of Svan Hoglund, appellant, vs. Franklin K. Lane, Secretary of the Interior, No. 2875, January term, 1916, as the same remains upon the files and records of said court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said court of appeals, at the city of Washington, this 24th day of January A. D. 1916.

[SEAL.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

(Indorsement on back:) File No. 25111. District of Columbia, Court of Appeals. Term No. 365. Franklin K. Lane, Secretary of the Interior, plaintiff in error, vs. Svan Hoglund. Filed January 28th, 1916. File No. 25111.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1916

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

FRANKLIN K. LANE, SECRETARY OF THE Interior, plaintiff in error, *v.* SVAN HOGLUND.	No. 365.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

Comes now the Solicitor General, appearing on behalf of the plaintiff in error, and moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

The Secretary of the Interior canceled the homestead entry of defendant in error for one hundred and sixty acres of the public lands on the ground of the latter's failure to comply with the homestead laws as to residence and cultivation of the land.

Thereupon defendant in error, claiming to have fully complied with the homestead law and to have

obtained a receiver's receipt upon the final entry in pursuance thereof, filed in the Supreme Court of the District of Columbia a petition for a writ of mandamus to compel the Secretary of the Interior to issue to him a patent for his entry on the ground that since no formal "protest or contest" against the validity of the entry was filed within two years from the date of the issuance of the receiver's receipt upon final entry, he became entitled, under section 7 of the act of March 3, 1891, 26 Stat. 1095, 1099, to a patent for the land, and it was the ministerial duty of the Secretary to issue the same forthwith.

Answer was filed by the Secretary, issue joined, and the cause was heard on an agreed statement of facts. The Supreme Court of the District dismissed the petition, and from its judgment defendant in error took an appeal to the Court of Appeals of the District of Columbia, which reversed the judgment and remanded the cause with instructions to issue the writ as prayed, the court holding—

1. That the proviso to section 7 of the act of March 3, 1891, is jurisdictional and fixes a limitation beyond which the Secretary of the Interior is without jurisdiction to question the right of an entryman to his patent; and

2. That the report of a deputy forest inspector attacking the integrity of the entry and filed within two years from the receiver's final receipt is not

sufficient to constitute a legal " protest or contest " within the meaning of said act.

The case is of importance to the Departmnet of the Interior in the administration of the homestead laws, for the reason that its determination will govern the action of the Secretary of the Interior in a number of similar cases now pending.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1916.

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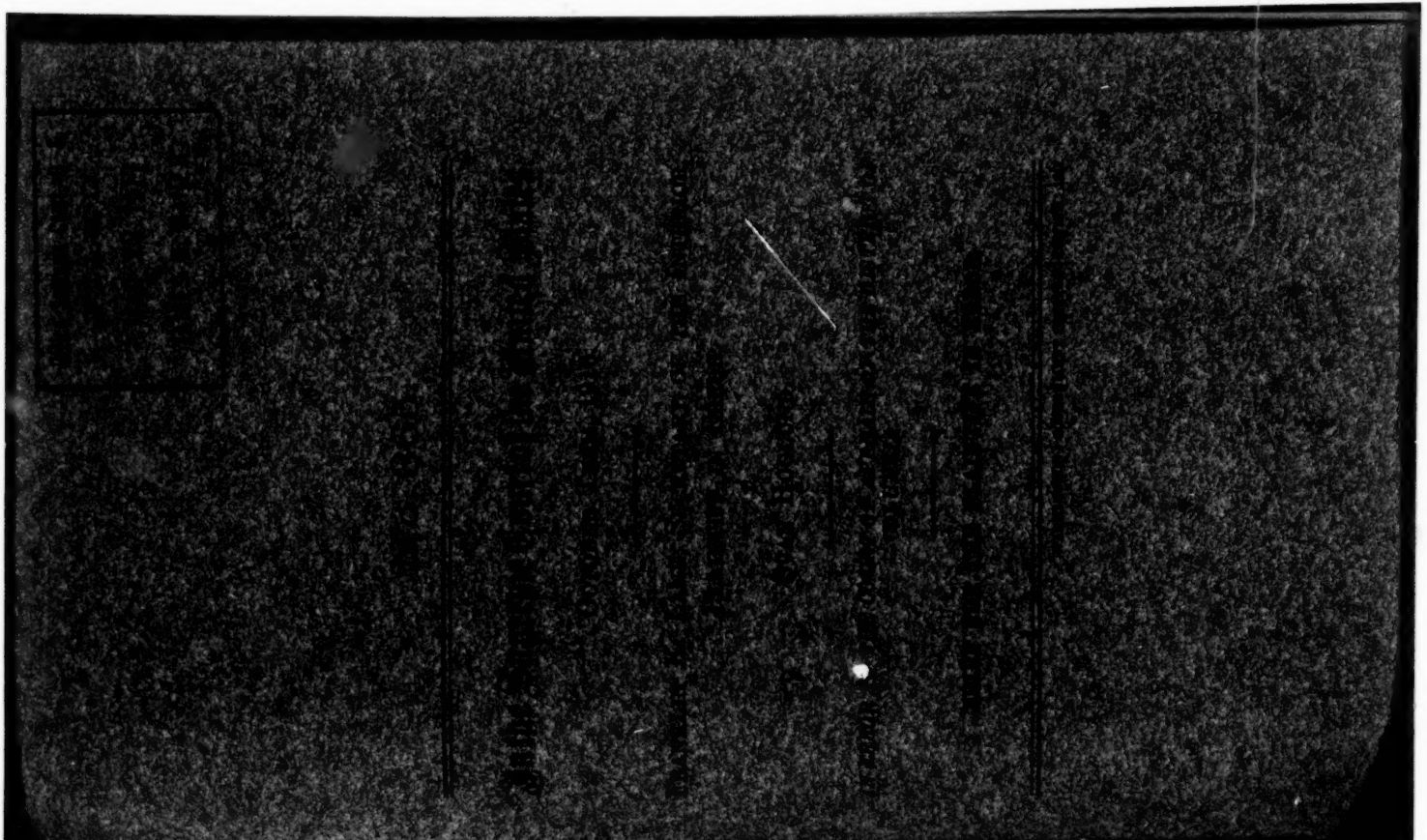

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

FRANKLIN K. LANE, Secretary of the Interior, Plaintiff in Error,
v.
SVAN HOGLUND.
No. 365.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT.

The Secretary of the Interior by writ of error brings up for review a judgment of the Court of Appeals of the District of Columbia awarding a writ of mandamus commanding him to reverse his decision canceling the homestead entry of Hoglund for noncompliance with the homestead law and to issue a patent on such entry.

The case was heard upon the petition of Hoglund (R. 1), the return of the Secretary (R. 20), and an agreed statement of facts (R. 25). The pertinent facts, which are undisputed, are as follows:

On July 26, 1902, Hoglund made homestead entry of a tract of public land in California. On January

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23, 1904, the President temporarily withdrew for forestry purposes an area embracing the land so entered, which, on May 6, 1905, was included within the Klamath National Forest. The proclamation establishing this reservation excepted all lands previously embraced in any legal entry, provided the entryman should continue to comply with the law under which the entry was made (R. 25; 34 Stat. 3001–3003).

On August 1, 1907, Hoglund made final proof, and on August 6, 1907, he received his final certificate and receiver's receipt from the local land office (R. 25). On November 12, 1908, the Deputy Forest Supervisor of this forest made a report on the entry recommending its cancellation "on account of nonresidence and lack of cultivation" (R. 26–28). This report was approved by the Forest Supervisor and transmitted by the District Forester to the Commissioner of the General Land Office, by whom it was received May 29, 1909 (R. 28). On April 19, 1910, the Commissioner ordered proceedings against the entry, notice of which was sent to the entryman on May 5, 1910, the charge being that the "entryman did not establish and maintain residence on the land" (R. 28).

A hearing followed before the Register and Receiver, who decided that the entryman had complied with the law and was entitled to a patent (R. 5–9, 29). This decision was affirmed by the Commissioner of the General Land Office subject to the right of the Solicitor of the Department of Agriculture to take an appeal to the Secretary of the Interior (R. 9–12, 29). On such appeal the Secretary reversed the Commis-

sioner's decision and canceled the entry (R. 29–30). A motion for rehearing was denied (R. 31), and thereafter the entryman filed a petition for the exercise of the supervisory authority of the Secretary, which was granted to this extent: At Hoglund's request his final proof which he had offered in 1907 was considered as commutation proof (R. 12–14, 31), and he was permitted to pay the commutation price of the land, on which a certificate of purchase was issued to him October 10, 1913 (R. 31).

In making this disposition the Secretary recognized the residence maintained by Hoglund from May, 1906, to August, 1907, which would have been sufficient to entitle him to commute his entry under section 2301 of the Revised Statutes but for the intervening forest reservation. Upon reconsideration at the instance of the Solicitor of the Department of Agriculture, the Secretary held that, as Hoglund was not complying with the law at the time of the establishment of the national forest, no new rights could be acquired by subsequent efforts to comply with the law as to residence and cultivation (R. 14–16, 31). Thereupon Hoglund filed a further petition for the exercise of the supervisory authority of the Secretary (R. 31, 19), contending for the first time that his original receiver's receipt, issued August 6, 1907, was absolutely confirmed by the proviso to section 7 of the act of March 3, 1891 (26 Stat. 1095, 1099), which reads as follows:

> That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under

> the homestead, timber-culture, desert-land, or preemption laws, or under this act, and *when there shall be no pending contest or protest against the validity of such entry*, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

This petition also was denied by the Secretary (R. 16–19).

Thereupon Hoglund filed his petition in the Supreme Court of the District of Columbia, in which he prayed for a writ of mandamus commanding the Secretary "to recall and revoke his said orders" canceling the homestead entry, to reinstate said entry upon the records of the Land Department, and to "cause the patent of the United States to be issued upon said entry" (R. 4). The Supreme Court of the District dismissed the petition without opinion (R. 32). The Court of Appeals reversed this decision "with instructions to issue the writ of mandamus as prayed in the petition" (R. 36–37).

The Court of Appeals, as shown by its opinion (R. 34–36), held that the proviso to section 7 of the act of March 3, 1891, *supra*, "fixes a limitation beyond which the Secretary is without jurisdiction to question the right of an entryman to his patent," unless, within two years after issuance of the receiver's receipt, "some affirmative action" is taken by the Land Department

"which formally challenges the entryman's right and of which he has full notice, with opportunity to answer and be heard." It was therefore held that the report and recommendation of the officers of the Forest Service that the entry be canceled, though made within the two-year period, did not constitute a pending contest or protest within the meaning of the statute, and that "nothing remains to be done but the mere ministerial act of issuing a patent" (R. 36).

ASSIGNMENTS OF ERROR.
(R. 38-39.)

1. In holding that after the lapse of two years from the date of the issue of the receiver's final receipt the Secretary of the Interior is without jurisdiction to question the right of an entryman to a patent unless prior to the expiration of such period of two years some affirmative action was taken by the Land Department formally challenging the entryman's right, and of which he had full notice, with opportunity to answer and be heard.

2. In holding and deciding that the report of the Deputy Forest Supervisor, filed in the General Land Office within two years after the date of the receiver's receipt, on the entry involved was not a good, sufficient, and legal protest within the meaning of the proviso to section 7 of the act of March 3, 1891.

3. In directing the issue of a writ of mandamus commanding the Secretry of the Interior to take action in a matter in direct opposition to his judg-

ment rendered in a case properly within his jurisdiction and involving the exercise of his discretion.

4. In holding that in an action against the Secretary by one claiming to be entitled to a patent under the homestead laws, the Secretary may be properly directed by writ of mandamus to issue such patent notwithstanding his formal decision finding that the entryman had not complied with the law and was not entitled to such patent.

5. In directing the issue of a patent for a tract of public land in a suit to which the United States is not a party.

PROPOSITIONS.

In support of the assignments of error we advance the following propositions:

1. The question as to what constitutes a pending contest or protest within the meaning of the confirmatory statute is for the Secretary to determine upon the facts before him.

2. The Secretary's decision was not arbitrary or capricious but a lawful exercise of judgment and discretion.

3. A decision of the Secretary which involves the lawful exercise of judgment and discretion can not be controlled by mandamus.

4. The courts of the District are without jurisdiction because the United States is the real party defendant and can not be sued.

ARGUMENT.

I.

THE QUESTION AS TO WHAT CONSTITUTES A PENDING CONTEST OR PROTEST WITHIN THE MEANING OF THE CONFIRMATORY STATUTE IS FOR THE SECRETARY TO DETERMINE UPON THE FACTS BEFORE HIM.

It will be conceded, of course, as it was conceded by the Court of Appeals, that the Secretary's decision canceling Hoglund's entry for noncompliance with the homestead law in the matter of residence is conclusive in this proceeding, unless the Secretary was without jurisdiction to decide that question, that is, unless the entry had already been confirmed by the statute.

The statute under consideration (*supra*, p. 3) gives to the entryman a right to a patent after the lapse of two years from the date of the receiver's receipt on final proof "when there shall be no pending contest or protest against the validity of such entry." As to what constitutes a contest or protest the law is silent. Yet, in order to administer the law, this clause must be construed and applied. The duty to do this necessarily devolves upon the Land Department, a special tribunal with judicial functions, charged with the execution of the public land laws, and under the supervision and control of the Secretary of the Interior. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324, and cases there cited; *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445, 447, 452; *Moses* v. *Long-Bell Lumber Co.*, 206 Fed. 51, 56.

II.

THE SECRETARY'S DECISION WAS NOT ARBITRARY OR CAPRICIOUS BUT A LAWFUL EXERCISE OF JUDGMENT AND DISCRETION.

The land covered by Hoglund's entry is within the limits of a national forest (R. 25). Within the prescribed two years after issuance of the receiver's receipt on final entry, responsible officers of the Forest Service sent to the General Land Office a report on this entry which concluded with the recommendation that it "should be canceled on account of nonresidence and lack of cultivation" (R. 26–28). If this report and recommendation, made by officers of the Government charged with the duty to protect the national forest against unlawful occupation, be not a "protest" against the validity of this entry, it would be difficult to imagine a form of document to which the name could be applied. If the officers of the Land Department had found this document not to be a protest, and thereupon had issued a patent to the entryman without ordering a hearing to determine the truth of the charge, we think they would have been guilty of a plain dereliction of duty.

Prior to December 13, 1913, the construction of this confirmatory statute by the Land Department had been fairly uniform and in harmony with the Secretary's decision in the case at bar. 27 L. D. 552; 31 L. D. 368, 371; 39 L. D. 437, 442; 40 L. D. 300. On that date Assistant Secretary Jones decided the case of *Harris*, 42 L. D. 611, 614. Confessedly

reversing prior departmental rulings, he held that a protest by a forest officer on behalf of the Government against the validity of an entry in a national forest is not a pending protest unless the Land Department, within the two-year period, "requires something to be done by the entryman or directs a hearing upon a specific charge." This, it should be observed, was not necessary to the decision, since it was found in that case that the entryman had in all respects complied with the law.

This ruling of the Assistant Secretary was cited and relied upon by Hoglund in the final hearing before the Secretary in this case (R. 18). As it is inconsistent with the Secretary's decision it must be deemed to have been overruled by him. To deny his power to overrule it, as the Court of Appeals plainly did, would deprive him of that independence of judgment which is essential to the discharge of the duties confided to him as the head of the Land Department. The Court of Appeals held that the rule of the *Harris* case was correct and finding the Secretary's ruling in this case to the contrary it awarded the writ commanding him in effect to retract his own decision and adopt the exceptional view of his assistant (R. 36).

This was a plain usurpation of the lawful authority of the Secretary. It was, moreover, at variance with prior decisions of that court. In *Fisher* v. *Grand Rapids Timber Co.*, 37 App. D. C. 436, and *Champion Lumber Co.* v. *Fisher*, 39 App. D. C. 158, 159, the Secretary had held that a communication from a special agent stating his opinion that a number of

final entries in a certain locality, including the one in question, were illegal, was a pending protest sufficient to arrest the confirmatory operation of this statute, although cancellation proceedings were not directed until after the lapse of the two-year period. In these cases a petition for writ of mandamus was denied. In the *Champion* case the Court of Appeals said (p. 161):

> The subsequent decision of the Secretary, that what was done within the two-year period constituted a protest against the patenting of the entry, was not arbitrary or capricious, but was based upon evidence; and the sufficiency of that evidence was for his and not our determination.

Subsequently, the *Champion* case came before this court on application for a writ of error to review the judgment of the Court of Appeals (227 U. S. 445). The writ was denied because, as the court said (p. 452), "the authority exerted was lawful and within the powers of the officers" of the Land Department, whence it resulted that the only real attack upon their action was that "the facts shown did not warrant the exercise of the power given by law." It is now held in this case that the Secretary, in making a similar decision upon a much more satisfactory state of facts, acted without lawful authority.

The case at bar is not like *Ballinger* v. *Frost*, 216 U. S. 240, 249, where the right to a patent for an Indian allotment became fixed and absolute after the lapse of nine months from the date of selection with-

out contest under the act of July 1, 1902, §§ 23, 71 (32 Stat. 641, 644, 656). In that case it was not claimed that a contest had intervened and there was no fact upon which such a claim could have been founded.

III.

A DECISION OF THE SECRETARY WHICH INVOLVES THE LAWFUL EXERCISE OF JUDGMENT AND DISCRETION CAN NOT BE CONTROLLED BY MANDAMUS.

This proposition is so well settled and familiar as not to admit of discussion. A few of the more recent authorities only need be cited.

Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316, 323–325.

Ness v. *Fisher*, 223 U. S. 683, 691–694.

Knight v. *Lane*, 228 U. S. 6, 13.

Lane v. *Mickadiet*, 241 U. S. 201, 210–211.

IV.

THE COURTS OF THE DISTRICT ARE WITHOUT JURISDICTION BECAUSE THE UNITED STATES IS THE REAL PARTY DEFENDANT AND CAN NOT BE SUED.

The writ of mandamus prayed for in the petition and awarded by the Court of Appeals would affect no pecuniary interest of the Secretary but would bind the United States and determine its title to the tract of land in question which it claims as a part of the Klamath National Forest. The suit is, therefore, in substance and effect against the United States. As the United States has not consented to

be sued or waived its immunity from suit, there is an absolute want of jurisdiction to grant the relief prayed for. *Oregon* v. *Hitchcock*, 202 U. S. 60, 68; *Louisiana* v. *Garfield*, 211 U. S. 70, 77; *New Mexico* v. *Lane*, decided March 6, 1917. The considerations involved in this proposition are coincident with those required to be taken into view in order to determine the power of the Secretary. *Lane* v. *Mickadiet*, 241 U. S. 201, 210.

CONCLUSION.

The judgment of the Court of Appeals of the District of Columbia should be reversed and the case remanded with directions to affirm the judgment of the Supreme Court of the District dismissing the petition for a writ of mandamus.

Respectfully submitted.

FRANCIS J. KEARFUL,
Assistant Attorney General.
S. W. WILLIAMS,
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March, 1917.

O

Office Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 365.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR,
PLAINTIFF,

vs.

SVAN HOGLUND, DEFENDANT.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

B. E. HINTON,
F. W. CLEMENTS,
Attorneys for Defendant.

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IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

July 6, 1902, Svan Hoglund, having previously settled upon a tract of public land within the Eureka land district, California, was permitted to make homestead entry therefor, and after due notice by publication, on August 1, 1907, he submitted ordinary five-year final proof thereon. No objec-

In

tion to his proof was made, and on the payment of the legal fees and commissions required final certificate and receiver's receipt on final entry were issued to him August 6, 1907.

Intermediate between the making of his original homestead entry and his offer of final proof, the lands entered were brought within the exterior limits of a forest reserve created under authority given by section 24 of the act of March 3, 1891, 26 Stats., 1095.

August 12, 1908, a deputy forest supervisor made a report recommending cancellation of defendant's homestead entry, and this report was forwarded to the Commissioner of the General Land Office, where it was received May 29, 1909.

No proceeding was instituted against the certificate authorizing defendant to receive a patent on his homestead entry until on March 5, 1910, the local officers at Eureka, California, notified defendant that charges had been filed questioning his compliance with the provisions of the homestead law. This notice was given pursuant to Commissioner's letter of April 19, 1910, addressed to the local officers directing proceedings against defendant's final entry. Hearing was held on the charges, at which defendant appeared, and on the record made both the local officers and the Commissioner of the General Land Office, by their decisions, held that the defendant had fully complied with the homestead law, and for that reason the charges against his entry were dismissed.

On an appeal by the Forest Service the Secretary of the Interior reversed the concurring decisions below in favor of the defendant, and held that the showing offered by him in support of his entry failed to meet the requirements of the homestead law respecting residence and cultivation. On defendant's petition, however, First Assistant Secretary Jones ordered that defendant's proof, offered at the time of final entry, be accepted as commutation proof.

In making title under the commutation provision of the homestead law it is required that the entryman pay for the

lands at the rate of $1.25 per acre. (See section 2301, U. S. R. S., amended by section 6, act of March 3, 1891, *supra.*) Defendant believing that he was thereby purchasing his peace with the Forest Service paid the required price in commutation of his homestead entry, and a *second* or supplemental receipt thereupon issued on his said homestead entry.

It should be here stated that although these proceedings against defendant's entry were ordered after the expiration of two years from the issuance of the receiver's receipt on final entry, and after he had become entitled to a patent under the proviso to section 7 of the act of March 3, 1891, *supra,* he was nevertheless forced to defend against said proceedings, because at that time the Interior Department was entirely disregarding said provision of law, holding that it had no application to proceedings against an entry initiated by the Government. Again, the departmental decision according the defendant the privilege of commutation upon his proof already submitted was dated *August 29, 1913,* when the Department was still disregarding said provision of law. However, on December 13, 1913, decision was rendered in what is known as the case of Jacob Harris, 42 L. D., 611, wherein it was held:

> "Upon mature consideration, the Department is convinced that a contest or protest, to defeat the confirmatory effect of the proviso, must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof; and, in conformity with the well-established practice of the Department, such a proceeding will be considered as pending from the moment at which the affidavit is filed, in the case of a private contest or protest, or upon which the Commissioner of the General Land Office, on behalf of the Government, requires something to be done by the entryman or directs a hearing upon a specific charge. The date of the issuance and service of notice is immaterial, if without undue delay and pursuant to the orderly course of business under the regulations. The Rules of Practice, relative to the abatement of

> private contests not diligently prosecuted, will be applied to all proceedings against entries, whether on the part of the Government or of a private individual. The Commissioner of the General Land Office is directed to prepare and submit to the Department, for its approval, regulations in harmony herewith, applicable to all proceedings by the Government against entries.
>
> "The case of Mertie C. Traganza, *supra*, and all others in conflict herewith are overruled and the decision appealed from is reversed."

Notwithstanding the many, and what was assumed by defendant to be the final decision of the Department in his favor, under which he made payment in commutation, the Secretary of the Interior thereafter, and in disregard of the decision in the Harris case, entertained a further motion for reconsideration by the Forest Service, and on September 24, 1914, 43 L. D., 539, recalled the decision accepting defendant's final proof as basis for commutation, and ordered the cancellation of his homestead entry.

Defendant thereupon specifically invoked the protection of the departmental ruling in the Harris case, *supra*, urging that as no proceeding was begun questioning his right under his final entry until more than two years after issuance of receiver's receipt on final entry, the subsequent proceedings under the order of the Commissioner of the General Land Office, dated April 19, 1910, were beyond his power to initiate, and should be held for naught. Defendant's petition in this regard was considered and denied April 20, 1915, 43 L. D., 540, whereupon these proceedings in mandamus were instituted in the Supreme Court of the District of Columbia. That court dismissed the appeal upon the appellant's motion, but the Court of Appeals reversed the lower court, and directed that the writ of mandamus issue as prayed for.

Summary.

It will be noted that defendant, having settled upon a tract of public land, made homestead entry therefor, and after about five years offered final proof, of which due notice was given by publication, as by law required; that although prior to this time this land had been brought within the exterior limits of a forest reserve, no forest officer or other person appeared to object when final proof was offered, and the proof when made was, after due consideration by the local officers, accepted and final certificate and final receipt issued to the defendant.

It is true that after more than a year from the issuance of the receiver's receipt on final entry a forest supervisor recommended that this entry be canceled, but no proceedings were instituted against the entry, or the defendant in anywise apprised of any complaint, until long after the expiration of two years from the issuance of the receiver's receipt on final entry, when he was notified by the local officers that charges had been filed questioning his compliance with law in the matter of residence and cultivation.

The Interior Department was then holding that its jurisdiction to inquire into a homesteader's compliance with law was in nowise interfered with by section 7 of the act of March 3, 1891, and there was nothing else for the defendant to do but to deny the charges and undertake the defense of his entry at a hearing ordered on the charges.

It may be that in the present proceedings the merits of claimant's compliance with law are not properly subject to inquiry, if the plaintiff had jurisdiction to consider the matter when cancellation of the defendant's entry was ordered, which claim of jurisdiction we deny; nevertheless we cannot refrain from saying that it is beyond comprehension how defendant's compliance with law can even be disputed, more or less denied, on the statement of facts respecting compli-

ance incorporated in the several departmental decisions rendered in this matter.

In Clements *vs.* Warner, 24 Howard, 394, 397, it was said by this court, in referring to the rights of a pre-emption settler:

> "The policy of the Federal Government in favor of settlers upon the public lands has been liberal. It recognizes their superior equity to become purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

In Ard *vs.* Branden, 156 U. S., 537, 543, this court said:

> "The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon."

In Tarpey *vs.* Madsen, 178 U. S., 215, 220, in referring to the rights of a settler on the public lands, it was said, after referring to the above from Ard *vs.* Branden:

> "With this declaration, in all its fullness, we heartily concur, and have no desire to limit it in any respect, and if Olney, the original entryman, were pressing his claims every intendment should be made in his favor in order to perfect the title which he was seeking to acquire."

The decision of the local officers, before whom the testimony was taken under the order of April 19, 1910, is reported in the record, pages 5 to 9, inclusive. In the course of their opinion it was said:

> "The charges as preferred allege 'that the entryman did not establish and maintain a residence on the land.'
>
> "While cultivation and improvements are requisites of a *bona fide* homestead entry, their relationship to the entry will not be overlooked, but this opinion will treat principally with the establishment and maintenance of residence.

"The first question to be decided in the case is whether or not residence was actually established. The testimony tends to show that the entryman went to his claim and repaired and improved an old cabin that was on the land, about the last of September, 1902, or about two months after making entry, providing himself with a cook stove and a bedstead, a table, and some benches out of rough lumber, secured provisions and remained on the claim about 3 weeks, then went to Portland and elsewhere, being away somewhat more than 2 months, then returned to the homestead about the 1st of January, 1903, and remained on the claim continuously, except for temporary absences of about 2 weeks, until the latter part of July, 1903, making somewhat less than ten months of continuous residence during the first year of the life of the entry (the two absences referred to above are considered by this office as being temporary), if we add to this the two months' constructive residence pending the time of establishing residence it will be seen that the entryman is entitled to credit for 12 months' continuous residence during the first year of the entry.

"Between January and July of 1903 the entryman erected a new house of 3 rooms, while not an elaborate affair, is much better than most bachelor entrymen have, with practically 12 months and actually 8 months of residence, can any one doubt the *bona fide* intentions of this man or question the actual establishment of residence? Certainly not.

"The next question is, Did Svan Hoglund maintain a residence on the land? From the date of his entry until July 27, 1903, he most assuredly did. From the last-mentioned date until May 26, 1906, he was employed by Hobbs, Wall & Co. in their lumber yard at Crescent City, about 50 miles distant from the homestead, at from 35 to 40 dollars per month, including board and bunk room. During these three years his time on the claim was very slight, approximately about 5 months or less in all. Periodically he would leave his work to go to his homestead 'to see things.' From May 26, 1906, until about August 1, 1907, he remained on the claim continuously.

We find that from the date of entry until final proof was made there has been a total residence of about 36 months, or an average of 6 months for five years. The claimant asserts that at the time he made entry his total possessions amounted to between 50 and 100 dollars. He probably earned more during his two months' absence in the winter of 1902, but in the spring he builds a new house, lives on the claim nearly 7 months where he has no income, then for lack of money he has to go to work to earn something to live on and with which to continue his improvements. During all these years his homestead was thought of and not forgotten, else why these trips back and forth.

"'No fixed rule can be formulated as to what constitutes good faith, the facts and circumstances surrounding each case should be carefully considered, and if the acts of the entryman do not clearly indicate bad faith the entry should not be forfeited' (4 L. D., 80).

"The fact that this entryman resided practically all of the first year on the claim, built a house when the old one might have answered the purpose, is surely an element of good faith. The circumstances surrounding the claim, its remoteness from market, the cost of clearing, and the financial condition of the entryman does not show bad faith for slackness of residence for three years. His act in returning to the claim and staying on the claim 14 months from May, 1906, to August, 1907, and clearing the same, is surely showing good faith. His action from the inception of the entry until final proof and since clearly indicate good faith and a *bona fide* intention of complying with the homestead law. There is nothing in the testimony to show that the entryman ever intended to abandon the claim, and while it is true the greater part of his time from July 27, 1903, to May 26, 1906, was spent in a bunk house at Crescent City, still it was in no way a home; he was there only temporary as a guest as many more were; a place to sleep and eat, which would immediately terminate were he discharged or quit the employ of the company.

"As additional evidence of good faith it is shown that Hoglund, in the spring of 1903, erected a new house of 3 rooms with a shed attached, when most men in an unmarried condition would have been contented with the old cabin that he had previously occupied; put in a floor of tongued and grooved lumber, and furnished the same with everything necessary for housekeeping by a single man, then for four years more continued to improve his home by clearing land, building a barn and wagon road, fencing, etc., at a cost of seven or eight hundred dollars in money and labor. It is sought to discredit the evidence of the entryman and the estimated cost of the improvements, but he is corroborated by witnesses Peterson and Frodelius; Frodelius saying he would not undertake to do what has been done on the claim for less than $1,000. Both these witnesses have met and passed through the same conditions under similar circumstances and in the same locality; they have had to clear land; had to build and purchase material and to devise means with which to live on and at the same time continue their improvements; therefore we are inclined to accept their statements in preference to those who had nothing but theoretical opinions to offer.

'As to cultivation under such circumstances, what were the use of raising more than could be used on the home. The question as to whether it would not be profitable to raise potatoes and fruit and haul them to Crescent City or Grant's Pass, 50 miles away, would not have been asked by one that had once undertaken it; that he did cultivate the land to a certain extent for the five years subsequent to making the entry and up to the time of final proof, appears to us as coming within the requirements of the law.

"The charge is 'That entryman did not establish and maintain a residence on the land.'

"There is no other charge, and as we have found that he did establish and maintain a *bona fide* residence during a period of five years immediately subsequent to entry, it is hardly necessary to proceed any further in this opinion, but as the law provides that after an entryman has fully complied with the law

and has submitted proof, he is no longer required to live on the land, but it expressly warns him that if he discontinues his residence prior to issuance of patent he does so at a risk in the event of an unsatisfactory proof or other evidence that would warrant the cancellation of the entry; in this case it appears that from August 1, 1907, until September 23, 1910, the entryman was absent from his work with Hobbs, Wall & Co., at Crescent City, on 8 different occasions, aggregating 114 days, if we are to believe the statements of the entryman and other witnesses, and there is no reason why we should not; these absences were for the purpose of going to his homestead to 'see to things,' in other words, to look after the conditions of his improvements and personal belongings that had been left in his house, in one instance he was away 31 days, another for 20 days, and at other times from 4 to 14 days; this appears conclusive to us that his home, the only one he had, was present in his mind at all times, else why this longing to go back to it; surely not for the tramp of 50 miles or more; there is nothing in evidence to show that he ever tried to dispose of it or that any one had tried to purchase the claim; he was not trying to sell; every action prior to and since final proof clearly show good faith and nowhere can we find intentional bad faith.

"While it is true there is considerable timber on the land it has been repeatedly held that such lands are agricultural and subject to homestead entry. There is no reason why this should be an exception; therefore that phase of the matter will be passed.

"The case at bar is in all respects identical with that of the United States *vs.* Bernhardt Frodelius involving H. E. Serial No. 01255 Eureka series, wherein the register and receiver decided in favor of the entryman, were sustained by the commissioner, patent for the land issuing sometime since.

"We are of the opinion that the Government's charges have not been sustained; that the entryman has acted in entire good faith; that the charges be dismissed and that homestead entry, serial No. 01401 pass to patent."

These facts are in no wise disputed in any of the subsequent departmental decisions. The First Assistant Secretary, Mr. Andrieus A. Jones, in his decision according to the defendant the right of commutation upon his final proof, made the following summary of claimant's compliance with law:

> "Upon reconsideration of the entire record, it is believed that an erroneous disposition has been made of this case. Undoubtedly at the date of the withdrawal for forestry purposes, and for sometime thereafter, the entry was subject to attack and cancellation because of the claimant's failure to substantially meet the requirements of the homestead law as to residence and cultivation. As has been before stated, however, this proceeding was not directed until nearly three years after the date of the submission of proof. The claimant is therefore entitled to judgment upon the entire record and his rights in the premises were not foreclosed prior to May, 1906. If all the facts before the Department would justify the issuance to him of a patent had no withdrawal intervened, he is entitled to patent notwithstanding the withdrawal. The very statement in the withdrawal, 'that this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law,' indicates a purpose not to confine the claimant to the facts theretofore existing, but to make his future conduct material, if not controlling.
>
> "It sufficiently appears from the record, in addition to what has been hereinbefore stated, that Hoglund made a valid settlement upon the land; that he has expended in the neighborhood of $1,000 in improvements thereon; that he was practically without means when the entry was made, and that he expended his surplus earnings in improving the land; that six years have elapsed since the issuance of final certificate, and there is no suggestion that he had sold or contracted to sell the land or the timber, or done any other act suggestive of speculation or bad faith; nor is there evidence that he has had any other home than on the land under consideration. The record

> fairly warrants the finding, and it is now the judgment of the Department, that his absences from the land during the period covered by the proof were necessary, and that he is entitled to have the final proof accepted, as he now asks that it be considered, as commutation proof.
>
> "For the reasons hereinbefore stated, the decisions of May 13, 1913, and July 15, 1913, are revoked and vacated, and the entry will be passed to patent upon payment of the purchase price for the land."

In the decision of the Secretary of the Interior ordering the cancellation of defendant's entry, he in no wise questions the facts regarding compliance as found by the other officers of his Department. Neither does he question defendant's right to a patent but for the intervention of the forestry order of withdrawal, and therefore bases his order of cancellation solely upon said order of withdrawal, finding *first*, that the withdrawal order took effect upon the lands included in defendant's homestead entry, because of his finding, many years later, that the defendant was not complying with the law at the time said withdrawal was ordered, and *second*, that said withdrawal order prevented any equitable consideration based upon acts performed by defendant with respect to the land occurring subsequently to said order of withdrawal.

On the record therefore we contend *first*, that defendant, as adjudged by the court below, is entitled to a patent for this land by reason of the proviso to section 7 of the act of March 3, 1891, *supra*, no proceeding affecting his rights under his final homestead entry having been begun within two years following the issuance of the receiver's receipt on such final entry; *second*, that because of the existence of claimant's uncancelled homestead entry, the forestry order of withdrawal never attached or operated upon the land included in said entry, and *third*, that defendant's entry being a valid appropriation of the land prior to the order of withdrawal, the right of commutation was an incident thereto, which was not effective by the inclusion of the lands within the limits of the forestry withdrawal.

ARGUMENT.

The Forestry Withdrawal.

By section 24 of the act of March 3, 1891, *supra*, it was provided:

> "The President of the United States may, from time to time, set apart and reserve, in any State or Territory having *public land* bearing forests, in any part of the *public lands* wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."

It will be noted that this section, while authorizing the creation of forest reservations, limits the power of reservation "to the *public lands* wholly or in part covered by timber or undergrowth."

Since the early case of Wilcox *vs.* Jackson (13 Peters, 498), it has been held by this court that whenever a tract of public land has once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of the public lands, and no subsequent law or proclamation or sale will be construed to embrace it or operate upon it, although no reservation were made of it.

The withdrawal order here in question was first ordered in 1904, and afterwards continued by executive order in 1905. Several years prior thereto, to wit, in 1902, the defendant, after settlement duly begun, had made homestead entry for this land.

There is no suggestion that defendant's entry was not made in entire good faith, and the facts as found by the Land Department show that his settlement begun before this entry, was shortly thereafter followed by a period of continuous residence of more than six months, with valuable

improvements, consisting of a substantial house of three rooms, and he thereby acquired and maintained that "inceptive right," which was "the commencement of title."

Chotard *vs.* Pope, 12 Wheaton, 586, 588.
Hofnagle *vs.* Anderson, 7 Wheaton, 212.

> "In no just sense can land be said to be *public land* after having been entered at the Land Office and a certificate of entry obtained. If public lands before the entry, after it they are private property."
>
> Wisconsin Central R. R. Co. *vs.* Price County, 133 U. S., 496, 506.
> Syor *vs.* Morris, 227 U. S., 524.
> United States *vs.* Buchanan, 232 U. S., 72, 76.

In Hastings, etc., R. R. Co. *vs.* Whitney, 132 U. S., 357, after a review of the prior decisions, both of the Land Department and of this court, respecting the effect of an entry of record, it was said by Mr. Justice Lamar (p. 361):

> "In the light of these decisions the almost uniform practice of the Department has been to regard land, upon which an entry of record valid upon its face has been made, as appropriated and withdrawn from subsequent homestead entry, pre-emption settlement, sale or grant until the original entry be canceled or declared forfeited; in which case the land reverts to the Government as part of the public domain, and becomes again subject to entry under the land laws."

And, again, on page 364, after noticing some defects in the form of the entry:

> "But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

Section 2297, R. S., provides for reversion of land included in a homestead on failure to establish residence within six months from date of formal entry, or abandonment of land entered for more than six months, but proof of such abandonment must first be given, after notice to entryman, before forfeiture of the entry can be declared and reversion of the land entered become an accomplished fact.

As shown by the record, no question was ever raised in any appropriate proceeding respecting defendant's compliance with the provisions of the homestead law until on March 5, 1910, nearly three years after the issuance of the receiver's receipt on final entry, and about five years after the proclamation including this land within the limits of the forestry order of withdrawal, when he was notified that charges had been filed questioning his compliance with the homestead law respecting residence and cultivation.

On the record made at the hearing on these charges, both the local officers who heard the testimony, as well as the Commissioner of the General Land Office, who reviewed the same, found that the defendant had fully complied with the law. True the Secretary of the Interior later, in 1914, reversed the favorable decisions, and held that claimant was not complying with the *strict letter of the law* at the time the forestry order of withdrawal was made, and that compliance with the *strict letter of the law* did not commence until the year thereafter, and for that reason held that the forestry withdrawal operated upon this land. Accepting this judgment on defendant's compliance with the law, it could only relieve the land from the effect of the entry from the time of its actual cancellation; surely not prior to notice to entryman, and could not have the effect of making this land public land, subject to the operation of the executive order of withdrawal when made; for at that time it was embraced in the defendant's subsisting entry, against which no charge had been made, ~~more~~ much less recognized through formal proceedings based thereon.

We say, therefore, that, in holding this land subject to the forestry order of withdrawal, the Secretary of the Interior did so arbitrarily, and in utter disregard of the decisions of this court.

The Commutation Right.

When the homestead law was enacted in 1862 it was specifically provided that a person making a homestead entry, which at that time required the period of five years' residence, in order to acquire title thereunder, should not be thereby precluded from obtaining a patent for the land thus entered "on making proof of settlement and cultivation, as provided by law granting pre-emption rights." This right of pre-emption of the land embraced in a homestead entry is commonly known as the right of commutation, and this provision is incorporated in section 2301 of the Revised Statutes. In other words, a party making a homestead entry might, at any time after six months' residence, that being the period of residence required in perfecting title under the pre-emption laws, commute his further period of residence required under the homestead law, by paying for the land as in pre-emption cases, at the rate of $1.25 per acre. This section was amended by section 6 of the act of March 3, 1891, *supra*, and as amended reads:

> "Sec. 2301. Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of section twenty-two hundred and eighty-nine from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months," and the provision of this section shall apply to lands on the ceded portion of the Sioux Reservation by act approved March second, eighteen hundred and eighty-nine, in South Dakota, but shall not relieve said settlers from any payments now required by law."

The undiputed facts in this case show that the defendant was continuously upon the land embraced in his entry from May, 1906, to August, in 1907, when his proof was made, a period of about fifteen months. Admittedly this period of residence entitled the entryman to the privilege of commutation, irrespective of his previous compliance with the *strict letter* of the homestead law; and it was under this provision that the First Assistant Secretary, Mr. Andrieus A. Jones, accorded to the defendant the privilege of having final proof accepted as commutation proof, which privilege defendant embraced, merely thinking thereby that he would, as before stated, purchase his peace with the Forestry Service.

The Land Department has uniformly ruled that, as the right of commutation is statutory, its exercise is coincident with the life of the homestead entry. See George R. Garlick, 6 L. D., 310.

It is our contention that the right of commutation is an incident to every valid homestead entry; that for the full life of the entry, so long as it remains of record uncanceled, the same is subject to the right of commutation, and that this right was admittedly earned by the defendant. The later decision of the plaintiff in error in overruling the decision of his first assistant and ordering the recall of the privilege of commutation, based alone upon the finding that this land had been included within the prior forestry withdrawal order, although then included in defendant's subsisting entry, was necessarily in disregard of the vested rights of the entryman through his purchase under the Departmental decision.

We say, therefore, that the adverse decision of the plaintiff in error in these particulars was arbitrary, capricious, and without legal justification, and should be reviewed by this court.

In this connection we call the attention of the court especially to the fact that in a case like this the defendant, if wrongfully deprived of a right earned under the homestead law, cannot maintain such right in the courts as against an-

other who may later make title to the land, for his right is denied because of a withdrawal which looks to a withholding of the lands from other disposition.

THE PLAINTIFF WAS WITHOUT JURISDICTION TO INQUIRE INTO DEFENDANT'S COMPLIANCE WITH THE HOMESTEAD LAW AT THE TIME HE ORDERED CANCELLATION OF DEFENDANT'S ENTRY.

It may be that under prior adjudications the plaintiff's decision upon the questions of law just adverted to, although in conflict with the decisions of this court, may not be open to review in these proceedings. It cannot be doubted, however, that if, prior to the initiation of the proceedings on which his judgment of cancelation was rendered the title of the defendant in and to the land covered by his homestead had, by operation of law, become fixed and determined, and that the retained jurisdiction in the Interior Department with respect to such entry was but ministerial for the purpose of the issuance of the patent thereon, as by law required, the subsequent unauthorized proceedings in the Land Department will be held for naught, and the writ commanding the issuance of the patent as by law provided, granted in the court below, will be by this court affirmed.

Our claim in this respect rests on section 7 of the act of March 3, 1891, by which it was provided:

> "SEC. 7. That whenever it shall appear to the Commissioner of the General Land Office that a clerical error has been committed in the entry of any of the public lands such entry may be suspended, upon proper notification to the claimant, through the local land office, until the error has been corrected; and all entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final

> entry, to *bona fide* purchasers, or incumbrancers, for a valuable consideration, shall, unless, upon an investigation by a Government agent, fraud on the part of a purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance: *Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him: but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor."

Under the proviso to said section the defendant became entitled to a patent at the expiration of two years from the issuance of the receiver's receipt on his final homestead entry, there being at that time no pending contest or protest, nor had any proceedings been instituted by the Government questioning his right to title under said final entry.

In the opinion of the court below, pages 34 to 36 of the record, the above section of the act was construed. Therein it was said:

> "This brings us to the construction of the act. By its express terms one of the grounds upon which an entryman's title may be assailed within the two-year limit is when an adverse claim originates prior to the final entry. The claim of the Government that this land was embraced in the forest reserve is nothing if it is not adverse. Therefore, its successful assertion could only be accomplished within the limitations of the act.
>
> "The mere report of the deputy forest supervisor is not sufficient to constitute a legal protest or contest. Before the Government can bring itself within the act some affirmative action must be taken by the Department which formally challenges the entry-

man's right and of which he has full notice, with opportunity to answer and be heard. We think the interpretation given to the act by the First Assistant Secretary of the Interior in the case of Harris, 42 L. D., '611, is correct, and, since the construction comes from an officer with initial jurisdiction to pass upon the act, we feel it our duty, when consistent, to give it our approval. In the Harris decision, after an elaborate review of the reasons which impelled Congress to place this limitation in the act, the Assistant Secretary said: 'Upon mature consideration, the Department is convinced that a contest or protest to defeat the confirmatory effect of the proviso must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof; and, in conformity with the well-established practice of the Department, such a proceeding will be considered as pending from the moment at which the affidavit is filed, in the case of a private contest or protest, or upon which the Commissioner of the General Land Office, on behalf of the Government, requires something to be done by the entryman or directs a hearing upon a specific charge."

"Clearly nothing was done by the Department in the present case to bring it within its own interpretation of the act. Such a step was essential to enable the Government to retain jurisdiction to question the regularity of petitioner's conduct prior to final proof. The two-year period having elapsed, the law settled petitioner's title so far as the Land Department is concerned. Hence, nothing remains to be done but the mere ministerial act of issuing a patent.

"The judgment is reversed, and the cause is remanded with instructions to issue the writ of mandamus, as prayed in the petition.

"Reversed and remanded."

In appellant's brief filed in this case are two suggestions, neither of which are founded upon any facts in this record. The *first* is that although admittedly the First Assistant Secretary, Mr. Andrieus A. Jones, had ruled in the Harris

case, *supra*, that a contest or protest to defeat the confirmatory effect of the proviso to said section 7 must be a proceeding sufficient in itself to place the entryman on his defense, or to require of him a showing of material fact when served with notice thereof, that decision was overruled by his superior, the appellant in this case, in his decision on defendant's entry, and the *second* is, that it was held in said decision that the report of a forest supervisor unacted upon amounted to a protest within the meaning of said proviso, and served to take the case out of the operation of the statute.

The decision of the appellant on defendant's entry will be found in the record, pages 16 to 19. Also, 43 L. D., 540.

In considering the defendant's petition invoking the protection of the then recent decision in the Harris case, the plaintiff in his decision said:

> "The case of Jacob A. Harris, 42 L. D., 611, is cited in support of the contention that the entry is confirmed. * * *
>
> "As previously stated, the entry was ordered canceled by departmental decision of May 13, 1913, on appeal, by decision on rehearing of July 15, 1913, and upon petition for the exercise of supervisory authority by decision of Sept. 24, 1914; and the act of March 3, 1891, *supra*, section 7 was not invoked by the entryman, but was for the first time plead in the petition now before me. *Said statute is not operative in this case, because the withdrawal for public use as a National Forest attached to the land May 6, 1905, at a time when the entryman was not complying with the law, prior to the issuance of receiver's receipt and certificate upon the final proof offered August 1, 1907, and, as stated, final action ordering the cancellation of the entry has heretofore been entered by the Department.*"

It will thus be seen that there was never a suggestion in appellant's decision on defendant's entry, nor in fact has there been in any subsequent departmental decision departing from the holding made in the Harris case, respecting the

effect to be given a report by a forestry officer unacted upon by the Interior Department. So far from said decision being overruled, it can be stated that hundreds of cases have been and others are still being adjudicated under that decision.

While it is not admitted that the above suggestions can have any possible bearing upon the adjudication of this case, nevertheless it is not thought advisable to pass them over without notice.

Coming now to a consideration of the proviso to said section 7, above quoted, we call attention to the fact that the construction given in the Harris case was but a return to that announced by the Interior Department immediately following the passage of the act.

May 8, 1891, a circular was drafted in the General Land Office addressed to the chiefs of division of that office, instructing them in the manner of administration under said section 7. This circular letter was forwarded to the Secretary of the Interior, and by him approved, and will be found in 12 L. D., page 450.

In treating of the proviso to said section 7 it was said in said circular letter:

> "Under the proviso to said section 7, after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the laws mentioned, when there are no proceedings initiated within that time by the government or individuals the entryman shall be entitled to patent: but all 'contests' and 'protests' against any entries of the classes mentioned, which were pending at the date of the passage of said act are excepted from the rule and will be considered and disposed of as if said section had not been passed.
>
> "The word 'contest,' as here used, shall be construed to be any adverse proceeding initiated under the Rules of Practice by a claimant for the purpose of securing the cancellation, or defeating the consummation of an entry on the ground of fraud, a failure to comply with the law, or a prior claim, with the intent to secure title in the contestant, or any pro-

ceeding by any person, under the provisions of the act of May 14, 1880.

"And the word 'protest', as here used, shall be interpreted as meaning any proceeding by any person who, under the Rules of Practice, seeks to defeat an entry on the ground that the entryman is guilty of fraud, either actual or constructive, in connection therewith, or has failed to comply with the law or rules of the department governing the same, or that there was, at the time he claims that his rights attached, a claimant for the tract desired to be entered, having prior rights or superior equities thereto.

"Nothing herein contained shall be construed as to prevent the government from completing proceedings initiated by it within the two years after the issuance of the receiver's receipt."

Shortly thereafter some question arose as to the meaning of the word "proceedings" as used in said circular letter, and the matter being again brought to the attention of the then Secretary, Mr. Noble, in a communication dated July 1, 1891, addressed to the Commissioner of the General Land Office, reported 13 L. D., page 1, he said:

"The word 'proceedings', as used herein and in the circular of May 8, 1891 (12 L. D., 450), will be construed as including any action, order or judgment had or made in your office canceling an entry, holding it for cancellation, or which requires something more to be done by the entryman to duly complete and perfect his entry, and without which the entry would necessarily be canceled."

Under this construction of the proviso thousands of suspended entries were considered and passed to patent.

With the change of administrations varying views occurred with regard to the effect of this proviso, and modifications of the above rule of construction were made, until finally it was held in the case of Mertie T. Traganza, 40 L. D., 300, that *"the proviso to section 7 of the act of March 3, 1891, has no reference to proceedings by the United States*

or its officers or agents in respect to entries of the classes therein specified."

This later rule of construction depriving the statute of any effect was followed until the decision of the Harris case, when return was ordered to the original rule of construction, which prevailed for a number of years following the passage of the act.

The purpose of the statute and the result of the changes occurring in the construction is admirably summed up in the decision in the Harris case (*supra*), in the following language:

> "The conflict in the decisions construing this proviso has rendered necessary a careful review of the circumstances leading to its enactment. The records of this Department disclose that, during several years preceding 1891, a very large number of entries were suspended by the General Land Office on vague and indefinite suggestions of fraud or non-compliance with law, to await investigation by special agents of that bureau. These suspensions were so numerous and the force available for investigation was so insufficient as to create a practical blockade in the issuance of patents to the serious prejudice of *bona fide* claimants under the public land laws. In many instances, the charge or suggestion upon which the suspension was ordered had no foundation of fact other than the proximity of the land to other tracts embraced in entries alleged to be fraudulent or otherwise illegal. The reports of this Department to the public land committees of the Senate and House of Representatives, concerning this legislation, and the debates of those bodies thereon, leave no doubt of the purpose of Congress that said proviso should correct the hardship of this situation and provide against a repetition thereof.
>
> "The construction placed by the Department upon the proviso to section 7, immediately after the passage of the act of March 3, 1891, *supra*, and which was long adhered to, was that the entry was confirmed against any proceeding by the Government, as well as against private contests and protests, unless such proceeding was pending at the expiration of two years from the

date of the issuance of the receiver's receipt upon final entry and amounted to an 'action, order or judgment had or made in your (Commissioner's) office canceling an entry, holding it for cancellation, or which requires something more to be done by the entryman to duly complete and perfect his entry, and without which the entry would necessarily be canceled.' See instructions of July 1, 1891 (13 L. D., 1).

"In the course of time many cases involving the proviso to section 7 of said act were brought to the attention of the Department in which the application of the principles announced in the earlier and, as the Department now holds, sound construction of the law, amounted to the passing to patent of fraudulent or otherwise illegal entries. Doubtless, with a desire to protect the public domain from spoliation, perhaps overlooking the history of the law, my predecessors have progressively modified the construction originally placed upon the proviso until finally it was held, in the case of Mertie C. Traganza (40 L. D., 300), that:

> " 'The proviso to section 7 of the act of March 3, 1891, has no reference to proceedings by the United States, or its officers or agents, in respect to entries of the classes therein specified.' "

"Passed, primarily, to rectify a past and to prevent future abuses of the departmental power to suspend entries, the proviso is robbed of its essential purpose and practically repealed by the decision in the Traganza case. It is unnecessary to consider so obvious and fundamental a proposition as that an executive Department of the Government has no legislative power and must leave to Congress and the courts the rectification of any evils that may flow from its administration of the law."

So far from overruling the holding made in the decision in the Harris case, we call attention to the following decisions of a later date extending that decision.

It was held in the case of George Judicak, 43 L. D., 246, that "in case no contest, protest or proceeding by the Govern-

ment was commenced against an entry within two years from the date of the issuance of final receipt, the Land Department is thereafter without jurisdiction to inquire into the known coal character of the land at the date of final receipt, but must issue unrestricted patent upon the entry" (syllabus), thus cutting off inquiry even as to the character of the lands at the expiration of the two years from the issuance of the receiver's receipt on final entry where no proceeding had been commenced questioning the character of the land within the two-year period.

Again, June 4, 1914, 43 L. D., 322, a circular letter of instructions was approved by the Department addressed to the chiefs of field division, in which attention was called to the decision in the Harris case, and the following is taken from said circular of instructions:

> "From the decision in the Harris case you will observe that it is held by the Department that an entry of the classes referred to in the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), is confirmed against, or, in other words, not subject to attack through, any proceedings by the Government in this Department, not begun prior to the expiration of two years from the date of the issuance of the receiver's receipt upon final entry; and that a proceeding by the Government is not a pending contest or protest within the meaning of said proviso until either a hearing has been directed by the Commissioner of the General Land Office upon a sufficient and specific charge, or the entryman is required by the Commissioner to make a showing of material fact, or to take some further action toward perfecting his claim.
>
> "You will observe that the Department holds in the Wood case that the proviso to section 7 of the act of March 3, 1891, *supra*, applies to entries made for lands which have been embraced in coal withdrawals subsequent to entry, if the receiver's receipt issued more than two years before the passage of the act of March 3, 1909 (35 Stat., 844); in other words, the act of March 3, 1909, has no application to entries upon

which the claimant was entitled to patent, under said proviso, prior to the passage of the act.

"These departmental decisions call attention to the fact that time under the statute of limitation created by the proviso to section 7 of the act of March 3, 1891, runs from the date of the issuance of the receiver's receipt upon final entry. There is no doubt that Congress chose the date of the receiver's receipt rather than of the certificate of the register as controlling, for the reason that payment by the claimant marks the end of compliance by him with the requirements of law. It would be manifestly unjust to make the right to a patent dependent upon the administrative action of the register, subjecting it to such delays as are incident to the conduct of public business and over which the claimant has no control. Payment, of which the receiver's receipt is but evidence, is, therefore, the material circumstance that starts the running of the statute, inasmuch as a claimant is and always has been entitled to a receipt when payment is made.

"In view of these decisions, you will immediately go over the cases pending for hearing in your division and postpone hearings on any which appear to be affected thereby.

"You are further directed to go over your dockets and report to this office such cases as are pending for investigation and appear to come within the terms of these decisions. Such cases as have heretofore been reported by you, in which proceedings have been ordered, and in which hearings have not been applied for, or, if applied for, in which the dates for hearing have not been set, should also be reported to this office. You will take action on such cases as are pending for investigation in which the two-year period has not yet expired, in order that reports may be submitted therein in sufficient time to enable this office to consider them before the two-year period expires."

It will thus be seen that the protection of the Harris decision was extended to instances where the final certificate had not yet issued, but where a receipt had been issued in payment made at the time of final proof.

Under these decisions, the Department has proceeded with the administration of the act in accordance with the construction therein given in the Harris case and later extensions, and the only instance where departure has been made from this line of administration was in the decision in the particular case now before the court, wherein a differentiation is attempted to be made, merely upon the incident that the tract entered, fell within the limits of a withdrawal made prior to the issuance of the receiver's receipt on final entry.

We say there is absolutely no room for the differentiation suggested, and that the decision is in deprivation of rights secured to the entryman by the act of Congress, aside from his rights to title as fixed by his full compliance with both the ordinary, as well as the commutation provisions of the homestead law.

The Case Before the Court.

In appellant's brief attention is particularly invited to the decisions of the Court of Appeals of the District of Columbia in Fisher *vs.* United States, 37 Appeals, D. C., 436, and United States *vs.* Fisher, 39 Appeals, D. C., 158. These cases were proceedings by mandamus to compel the Secretary of the Interior to issue patents for certain lands to the petitioners, on the ground that they were entitled thereto under the same provision of the act of 1891 that is here brought in question. In these cases, however, the Secretary had, when passing upon the entries there in question, specifically ruled that reports made by a special agent on those entries was a protest within the meaning of the law, and the Court of Appeals merely held that the holding of the Secretary in this respect could not be reviewed in the mandamus proceedings.

Counsel fails to note, however, that later title was given to others, after rights had been denied prior entrymen on a like ruling under the act of 1891, and a case was brought

in the District Court of Oregon to charge the holder of the title under the United States patent as trustee for the former entryman, whose entry had been thus erroneously canceled. The case is reported as Gildner *vs.* Hall, 227 Fed. Rep., p. 704. In that case the court specifically ruled that the mere report of a special agent did not amount to a protest within the meaning of that term as used in the proviso to section 7 of the act of March 3, 1891, and in the course of the opinion the varying constructions of said proviso by the Interior Department, beginning with the instructions issued immediately following the passage of the act and ending with the decision in the Harris case, hereinbefore referred to, are reviewed, and the construction given in the Harris case is fully upheld and relied upon by the court.

Reference is also made in appellant's brief to the decision of this court in the case of United States *ex rel.* Champion Lumber Company *vs.* Fisher, 227 U. S., 445. That case involved a petition for the allowance of a writ of error to the Court of Appeals of the District of Columbia to review a judgment of that court affirming the judgment of the Supreme Court of the District of Columbia, dismissing the petition of the Champion Lumber Company. In the course of the opinion it was said at pages 451 and 452:

> "It appears that the petitioner contended that no protest was pending in the Department which could rightfully justify the withholding of the patent. The officers of the United States took issue upon this allegation, and the Court of Appeals decided that there was testimony before the Secretary authorizing the exercise of the discretion conferred by law to withhold the patent, and upon that ground affirmed the decision, refusing the writ. The case was therefore submitted and decided upon the issue whether the action of the Secretary was justified in the exercise of his lawful discretion because of the facts disclosed in the record. The petitioner did not challenge, nor did the court pass upon, the validity of any authority exercised under the United States, nor

> was the existence or extent of the authority or duty of an officer of the United States drawn in question in the sense in which it is used in the statute, that is, brought forward and made a ground of decision. The statutes under which the officers of the United States acted were concededly valid, and the authority exerted was lawful and within the powers of the officers, if the facts justified their action. The petitioner's real attack upon the action of the Secretary and Commissioner was because the facts shown did not warrant the exercise of the power given by law. The decision of that issue, upon which it is clear the case turned, neither involved nor decided the questions which make the case appealable to this court under the fifth clause of p. 250 of the Judicial Code."

In that case, like the two preceding cases, the Secretary of the Interior had found that there was a protest pending within the two years from the issuance of the receiver's receipt on final entry, which took the case out of the operation of the statute, and, as will be seen, the Court of Appeals decided that there was testimony before the Secretary authorizing the exercise of the discretion conferred by law to withhold the patent, and upon that ground affirmed the decision refusing the writ. The sole question considered by this court was whether the validity of any authority exercised under the United States, or the existence or scope or any power or duty of an officer of the United States was thereby drawn in question, and this court, finding in the negative, denied the petition.

It must be clear, therefore, that the decisions referred to by appellant do not have controlling effect on the case now before this court.

In the conclusion of appellant's brief it is claimed that there is an absolute want of jurisdiction in this case, the claim being made upon the theory that as the title to the land included in defendant's entry is yet in the United States, in substance and effect the case amounts to a suit against the United States.

In this connection appellant refers to the recent decision of this court in case of New Mexico *vs.* Lane, wherein the petition was dismissed. That case involved claim to a section of the number granted to the State in aid of common schools. Mineral lands were specifically excepted from the grant to the State, and the Secretary had found that the land was valuable for coal and known to be at the date of the admission of the State. The question as to the character of the land is one of fact specially committed to the Secretary for determination.

In disposing of the case this court said:

> "The motion should be granted on the ground that the suit is one against the United States, under the authority of *Louisiana vs. Garfield*, 211 U. S., 70. In that case a bill was brought in this court to establish the title of the State of Louisiana to certain swamp lands which it claimed under the statutes of the United States and to enjoin the Secretary of the Interior and other officers of the Land Department from carrying out an order making different disposition of the land.
>
> "Under the statute it was contended the land vested in the State in fee simple, that is, the act was contended to have the same character and efficacy as the act of June 21, 1898, is asserted to have in the case at bar. And certain facts were necessary to be determined as elements of decision. This court said that in the case there were questions of law and of fact upon which the United States would have to be heard. So in the present case there is a question of law whether the act of June 21, 1898, had the quality as a grant of the land asserted of it, whether of itself or because of its terms or their prior construction and its adoption, indeed, whether there was such a prior construction or its adoption, and again of the fact of the character of the land at the time of the grant and the evidence of it and the knowledge of it.
>
> "It would seem, besides, that under the averments of the bill Keepers is an indispensable party, he having become, according to the bill, a purchaser of the land and paid the purchase price thereof. To make

> him a party would oust this court of jurisdiction if he is a citizen of New Mexico, and the presumption expressed by defendants that he is complainant does not deny" (*California vs. Southern Pacific Co.*, 157 U. S., 229).

This case involves no question of fact and can in no wise be controlled by the decision in the New Mexico case.

Counsel apparently fail to appreciate that the bill filed in this case attacks the jurisdiction of the appellant, in instituting proceedings to inquire into the deefndant's compliance with the homestead law after his jurisdiction in these particulars had been terminated, and that therefore his subsequent action was unauthorized and but cast a cloud upon the title of the defendant in error.

Prior to the action complained of the Land Department had ruled that an agent's report did not of itself constitute a protest within the meaning of the proviso to section 7 of the act of March 3, 1891, and that holding still prevails in said Department and many thousands of titles have been passed out thereunder.

In the present case the plaintiff in error did not overrule the decision in the Harris case, nor did he find that there was a protest filed within two years following the issuance of the receiver's receipt on final entry. When the holding in the Harris case was invoked he merely held that said decision did not apply because of his judgment on defendant's compliance with the homestead law based on a record made or proceedings instituted after he had lost jurisdiction to institute same. That is the case made by this record.

In Conclusion.

It may not be inappropriate in conclusion to call attention to the fact that the act of March 3, 1891, often referred to herein, was an omnibus act, containing 24 sections, and amounted to a practical revision of the public-land laws. While this act gave authority to create forest reserves, it also

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extended protection to homestead entrymen where receipts on their final entries had stood unquestioned for more than two years. The section conferring the right to create forests *limited* the lands that might be reserved to the *public lands*, and the section granting protection to homestead entrymen *did not limit the lands to those without the boundaries of a forest*, but included *"any tract of land under the* homestead law."

In protecting rights under final receipts it recognized a practice existing throughout the public domain of regarding a final receipt as the equivalent to a patent.

We think it is not overstated when we say that nine-tenths of the public lands were transferred on final receipts without awaiting issuance of patents, hence the law, in so far as it protected rights under final receipts, was in effect a statute of repose.

Just here let us notice section eight of this act extending protection to those holding lands under a Government patent, by providing that no suit to vacate and annul a patent theretofore issued shall be brought after the expiration of five years from the passage of said act.

Prior to said act such an action might be instituted at any time, there being no limitation upon the right of the Government to set aside a title improperly acquired.

The case of United States *vs.* Chandler-Dunbar Co. (209 U. S., 447, 450) was a suit instituted to set aside a patent under an entry after the expiration of five years, and to take the case out of the statute, it was argued that the land had been *reserved and was not subject to the entry.*

In disposing of the case the Supreme Court said, at pages 449-450:

> "There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion that now the patent must be assumed to be good. The statute just referred to provides that 'suits by the

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United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act,' that is to say, from March 31, 1891. This land, whether reserved or not, was public land of the United States and in kind open to sale and conveyance through the Land Department. United States *vs.* Winona & St. Peter R. R. Co., 165 U. S., 463, 476. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. Leffingwell *vs.* Warren, 2 Black, 599.' See also U. S. *vs.* St. P., M. & M. Ry. Co., 225 Fed. Rep., 27."

In the present case the proviso to section seven, invoked by Hoglund, includes, as before stated, *any tract of land entered under the homestead law,* and even if it were admitted that his compliance with the law under his homestead entry had not been satisfactory and that his entry might have been canceled prior to the withdrawal, the fact is that no proceeding was instituted and his entry was not canceled. We think, however, it might be further said, although not necessary in this case, that had his entry been made *after the withdrawal* and in plain violation of its terms, nevertheless, as he was granted a certificate and receipt on final entry, which stood unquestioned for a period of two years, a patent must have been issued to him under this statute.

Surely, then, in the present case, where the land re-

mained segregated by Hoglund's valid homestead, and he was permitted, without protest or objection, to make final proof, which was duly accepted, and upon which certificate and receipt on final entry issued to him, which stood without contest or question and against which no proceeding was instituted for more than two years, the claimant is entitled to the protection of the statute and the authority of the Department to proceed against the entry was at an end and he became entitled to a patent. His rights, therefore, are clearly of the class known as *vested*, and the jurisdiction remaining in the Department regarding the entry was but *ministerial*, to issue to him a patent as by the law provided.

We think, therefore, that the Secretary clearly exceeded his authority in initiating proceedings against this entry and in its attempted cancellation after the expiration of two years from the issuance of the receiver's receipt on final entry, and that the power and protection of this court should be extended to him in protection of his vested rights in this property, admittedly despoiled by the unlawful act of the defendant.

B. E. HINTON,
F. W. CLEMENTS,
Attorneys for Defendant.

LANE, SECRETARY OF THE INTERIOR, *v.* HOGLUND.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 365. Argued April 11, 1917.—Decided May 21, 1917.

Section 7 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099, lays upon the Secretary of the Interior a plain duty to cause a patent to be issued upon a homestead entry when no contest or protest proceeding has been initiated and no order has been made, in his Department, for the purpose of challenging the validity of the entry, within two years from the issuance of the final receiver's receipt.

An adverse report by a deputy supervisor of a National Forest, challenging a homestead entry within the forest for insufficiency of residence and cultivation, but merely filed in the General Land Office and not acted on until after the two year limitation period had expired, *Held* not a "pending contest or protest" within the meaning of § 7 of the Act of March 3, 1891, *supra*.

Notwithstanding its reluctance to award or sustain a writ of mandamus against an executive officer, the court is constrained to do so where the duty sought to be enforced is plain and nondiscretionary and the situation exigent.

44 App. D. C. 310, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful, with whom *Mr. S. W. Williams* was on the brief, for plaintiff in error.

Mr. F. W. Clements, with whom *Mr. B. E. Hinton* was on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a petition for a writ of mandamus against the Secretary of the Interior. In the court of first instance the writ was refused, but the Court of Appeals directed that it be granted, 44 App. D. C. 310, and our jurisdiction arises out of the fact that the construction of a statute of the United States and the duty of the Secretary of the Interior thereunder are drawn in question. The statute is the following provision in § 7 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099:

"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preëmption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled

to a patent conveying the land by him entered, and the same shall be issued to him."

What is meant by a "pending contest or protest" is the question under the statute. The facts are not in dispute and are these:

In 1902 Svan Hoglund settled upon and made preliminary entry under the homestead law of a tract of public land in the Eureka land district in California. In 1905 the land was included within a national forest reserve by a proclamation of the President, 34 Stat. 3001, which contained the following excepting clause:

"Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; *Provided*, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made."

In due time thereafter, and after due notice by publication of his purpose so to do, Hoglund submitted final proof of compliance with the homestead law and of his right to obtain the title. The proof was accepted as satisfactory by the local officers and on August 6, 1907, a receiver's receipt and a register's certificate upon final entry were regularly issued to him.

May 29, 1909, a report from a deputy forest supervisor recommending the cancellation of the entry "on account of non-residence and lack of cultivation" was received at the General Land Office. The report indicated that the entryman was a single man, and had a three-room house, a small barn and some fencing on the land; that he had three acres plowed and under cultivation; that the land

had much valuable timber thereon, but none had been cut except for improvements, and that the entryman had established actual residence on the tract in June, 1902, but had really lived thereon only at unnamed periods, "going away to work for wages four or five months at a time." No action upon this report was taken until April 19, 1910. On that day, almost three years after the date of the receiver's receipt, the Commissioner of the General Land Office ordered a proceeding in the local land office to determine whether the entryman had established and maintained a residence upon the land. Notice of this was given to him—apparently it was his first information that his entry was called in question—and a hearing was had. The local officers and the Commissioner of the General Land Office in turn found the facts in his favor, but the Secretary of the Interior found them the other way and ruled that the entry was not confirmed or protected by the provision in § 7 of the Act of March 3, 1891, *supra*. 42 L. D. 405; 43 L. D. 538 and 540.

The Secretary directed that the entry be cancelled and the present petition was then filed. It prayed for a writ of mandamus commanding the Secretary to recall the order for the cancellation of the entry, to reinstate the entry upon the records and to cause a patent to be issued to the entryman.

For present purposes no importance attaches to the creation of the forest reserve after the primary and before the final entry. The entryman was free under the terms of the President's proclamation to proceed with the steps essential to obtain a final entry and ultimately the full title, and to such a final entry the statute—the provision in § 7—has the same application as if the land were without instead of within the reserve.

The statute makes it very plain that if at the expiration of two years from the date of the receiver's final receipt there is no "pending contest or protest" against the entry

its validity no longer may be called in question—in the words of the act, "the entryman shall be entitled to a patent . . . and the same shall be issued to him." The purpose to fix his right and to command its recognition is obvious. What, then, is the "pending contest or protest" which is to exclude a subsisting entry from this statute of limitation and repose? Is it some proceeding which is begun, ordered or set in motion in the interest of another claimant or of the public to test or determine the validity of the entry? Or may it be a mere report, letter or other communication, confidential or otherwise, which has not been and may never be acted upon, which may be neither known nor accessible to the entryman, or which may be so general, vague or intemperate in its statements as not in itself to merit attention? Independently of the occasion for the enactment and of the practice of the Land Department, there hardly could be any difference of opinion about the answer. And when these are understood we think there is no room whatever for a difference; in short, the reference is to a proceeding against the entry and not to some communication which at most is only suggestive of the propriety of such a proceeding and may never become the basis of one.

As applied to public land affairs the term "contest" has been long employed to designate a proceeding by an adverse or intending claimant conducted in his own interest against the entry of another, and the term "protest" has been commonly used to designate any complaint or objection, whether by a public agent or a private citizen, which is intended to be and is made the basis of some action or proceeding in the public right against an existing entry. This explains the use in the statute of both terms in the disjunctive, and accords with the instructions of May 8, 1891, 12 L. D. 450, wherein each term is spoken of as meaning a "proceeding" under the Rules of Practice to cancel or defeat an entry, and wherein it is said that

"when there are no proceedings initiated within that time [the two years] by the government or individuals the entryman shall be entitled to patent." The same view is shown in the supplemental instructions of July 1, 1891, 13 L. D. 1, wherein the Secretary said to the Commissioner: "You will, therefore, approve for patent all entries against which no proceedings were begun within the period of two years from the date of the final certificate, but where proceedings have been, or shall be, begun within the specified period, the entry will be held to have been taken out of the operation of this statute, and such cases will proceed to final judgment as heretofore."

Subject to some exceptions and qualifications which need not be specially noticed, this continued to be the view and practice of the Land Department for many years and in conformity therewith many thousands of entries were carried to patent or otherwise as their particular facts caused them to fall upon one side of the line or the other. But in the case of *Mertie C. Traganza*, 40 L. D. 300, decided November 17, 1911, a sharp departure was taken from the earlier view and it was held that the statute has "no reference to proceedings by the United States, or its officers or agents" against such entries and does "not affect the conduct or action of the Land Department in taking up and disposing of final proof of entrymen after the lapse of the two years mentioned in the act." That view, however, did not long have the approval of the Department. In the case of *Jacob A. Harris*, 42 L. D. 611, decided December 13, 1913, the subject was reconsidered, attention being given to the occasion for the enactment and to its prior administration, and the conclusion was reached that the earlier view, long maintained, was right and that the practice thereunder should be restored. In that case, as in this, a forest officer reported that the claimant had not established or maintained a residence upon the land, and no action was

taken on the report until after the expiration of the two-year period. But in that case the entry was held to be confirmed under the statute while here the ruling was the other way. Of the situation which prompted the enactment of the statute it was said in the decision in that case:

"The records of this Department disclose that, during several years preceding 1891, a very large number of entries were suspended by the General Land Office on vague and indefinite suggestions of fraud or noncompliance with law, to await investigation by special agents of that bureau. These suspensions were so numerous and the force available for investigation was so insufficient as to create a practical blockade in the issuance of patents to the serious prejudice of *bona fide* claimants under the public land laws. In many instances, the charge or suggestion upon which the suspension was ordered had no foundation of fact other than the proximity of the land to other tracts embraced in entries alleged to be fraudulent or otherwise illegal. The reports of this Department to the public land committees of the Senate and House of Representatives, concerning this legislation, and the debates of those bodies thereon, leave no doubt of the purpose of Congress that said proviso should correct the hardship of this situation and provide against a repetition thereof."

And it was also said:

"Passed, primarily, to rectify a past and to prevent future abuses of the departmental power to suspend entries, the proviso is robbed of its essential purpose and practically repealed by the decision in the Traganza case. . . .

"Upon mature consideration, the Department is convinced that a contest or protest, to defeat the confirmatory effect of the proviso, must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof."

That decision was followed in *George Judicak*, 43 L. D. 246; *Joseph Crowther*, *ibid.* 262; Instructions, *ibid.* 294 and 322.

Looking, then, at the statute in the light of all that bears upon its purpose and meaning, we think it certainly and unmistakably lays upon the Secretary of the Interior, as the head of the Land Department, a plain duty to cause a patent to be issued to a homestead entryman whenever it appears, as concededly it did in this instance, that two years have elapsed since the issue of the receiver's receipt upon the final entry and that during that period no proceeding has been initiated or order made which calls in question the validity of the entry. In the exercise of its discretion Congress has said, in substance, by this statute that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time it shall be passed to patent as a matter of course. Thus in a case like this, where according to the conceded facts no proceeding was begun within the prescribed period, there is no room for the exercise of discretion or judgment, but on the contrary a plain duty to see that the entryman receives a patent.

True this court always is reluctant to award or sustain a writ of mandamus against an executive officer, and yet cases sometimes arise when it is constrained by settled principles of law and the exigency of the particular situation to do so. *Kendall* v. *United States*, 12 Pet. 524; *United States* v. *Schurz*, 102 U. S. 378; *Roberts* v. *United States*, 176 U. S. 221; *Garfield* v. *Goldsby*, 211 U. S. 249; *Ballinger* v. *Frost*, 216 U. S. 240. And see *Noble* v. *Union River Logging Railroad Co.*, 147 U. S. 165; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. This, we think, is such a case. As quite apposite we excerpt the following from the unanimous opinion in *Roberts* v. *United States*, *supra*, p. 231:

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

We therefore conclude that the Court of Appeals rightly directed that the writ be granted.

Judgment affirmed.